Supreme Court U.S.
FILED

00-1146 JAN 16 2001

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No. 00-

IN THE
Supreme Court of the United States

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Sanford M. Stein
Leo P. Dombrowski
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Date: January 16, 2001

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QUESTION PRESENTED

In *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), the Court adopted a "dual standard" with respect to fee-shifting provisions contained in federal civil rights laws: prevailing plaintiffs in such cases are presumptively entitled to attorney fee awards, while prevailing defendants are entitled to fees only if they can demonstrate that the plaintiff's suit was "frivolous, unreasonable, or without foundation." 434 U.S. at 421. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Court held that the *Christiansburg* "dual standard" should not be applied mechanistically to fee-shifting provisions contained in federal statutes outside the civil rights context, even when the statutory language is similar to the language at issue in *Christiansburg*. *Fogerty* held that prevailing defendants should be placed on an equal footing with prevailing plaintiffs in determining whether an award of fees is warranted under the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. § 505. *Fogerty*, 510 U.S. at 534. The question presented is:

Whether prevailing defendants should be placed on an equal footing with prevailing plaintiffs in determining whether an award of attorney fees is "appropriate" under the fee-shifting provision of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(f), and similarly worded fee-shifting provisions of other federal environmental statutes.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court of appeals were:

(1) The Steel Company; and

(2) Citizens for a Better Environment.

Pursuant to Supreme Court Rule 29.6, petitioner The Steel Company, a/k/a Chicago Steel and Pickling Company, states that it has no parent company, and that no publicly held company holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals from which review is sought (App. 1a-20a) is reported at 230 F.3d 923 (7th Cir. 2000). The order of the district court denying Petitioner's motion for an award of attorney fees (App. 21a-26a) is not reported. Other aspects of this case were before the Court in 1998. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This petition involves the fee-shifting provision of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(f):

> **Costs.** The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. . . .

EPCRA's entire citizen suit provision, 42 U.S.C. § 11046, is reproduced in the Appendix at 27a-31a.

STATEMENT OF THE CASE

A. The Issue. More than 30 federal environmental statutes include provisions allowing private citizens, under certain circumstances, to bring suit against entities alleged to have violated environmental laws. The past 15 years have witnessed an "explosion" in the number of such citizen suits. Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement,* 11-SPG NAT. RESOURCES & ENV'T 20 (Spring 1997).

That explosion has been fueled in no small degree by the inclusion of a fee-shifting provision in each of the citizen suit statutes. Because federal courts have awarded attorney fees to prevailing plaintiffs in environmental citizen suits as a matter of course, a cottage industry has sprung up consisting of lawyers and affiliated environment groups dedicated almost exclusively to -- and largely financed by fees derived from -- bringing such suits. *Id.* at 21.

The attorney fee provision at issue in this case, 42 U.S.C. § 11046(f), contains language that is identical to virtually all other fee-shifting provisions in federal environmental laws. It provides that "whenever the court determines . . . an award is appropriate," the court may award "reasonable" attorney fees to "the prevailing or substantially prevailing party" in an action brought pursuant to EPCRA's citizen suit provision. Section 11046(f) and similar fee-shifting statutes are written in party-neutral terms; nothing in the language suggests that the analysis regarding whether an attorney fee award is "appropriate" should vary depending on whether the prevailing party is a plaintiff or a defendant.

Nonetheless, the only two federal appeals courts to have addressed this issue *directly* -- the Seventh Circuit in this case and the Ninth Circuit in *Marbled Murrelet v. Pacific Lumber Co.*, 182 F.3d 1091 (9th Cir. 1999), *cert. denied,* 112 S.Ct. 933 (2000) -- have held that fee awards in environmental citi-

zen suits ought to based on a "dual standard." Under that standard, prevailing plaintiffs are presumptively entitled to attorney fee awards, while a prevailing defendant is entitled to fees only if he can demonstrate that the plaintiff's suit was frivolous, unreasonable, or without foundation. That dual standard is derived from *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), which held that the dual standard ought to be applied to fee awards in suits seeking redress under the federal civil rights statutes.

Significantly, neither the Seventh Circuit nor the Ninth Circuit based its holding on any sort of detailed analysis of the environmental statutes at issue. Rather, each Court deemed itself bound to follow a 1986 decision from this Court, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), which held (the Seventh and Ninth Circuits believed) that the *Christiansburg* dual standard should be engrafted onto federal environmental statutes. App. 15a; *Marbled Murrelet,* 182 F.3d at 1095.

The Seventh and Ninth Circuits have badly misread *Delaware Valley*. That decision had nothing to do with the circumstances under which it is "appropriate" for a district court to make a fee award to a prevailing party in an environmental citizen suit and did not discuss whether a "dual standard" should be applied when making such fee-award determinations. Indeed, the Court's later decision in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), makes clear that it is wary of expanding the "dual standard" to fee-shifting provisions contained in federal statutes outside the civil rights context.

Such widespread confusion among the lower federal courts regarding the holding in *Delaware Valley* counsels strongly in favor of granting review in this case. Appeals courts in at least two circuits have been unwilling even to entertain arguments regarding the impropriety of applying a "dual standard" to environmental fee awards, because they

believe (erroneously) that *Delaware Valley* precludes them from doing so. That situation is likely to continue, thereby precluding any development of the law in this area, until such time as the Court addresses the issue itself.

In light of the explosive growth in environmental citizen suits, the standards applicable to fee requests from prevailing defendants is an issue that will arise with increasing frequency. That growth is being fueled to a considerable extent by the economic incentives created by the "dual standard" applied to fee awards; under that standard, potential citizen litigants have much to gain and little to lose by filing nonfrivolous lawsuits of even doubtful merit. Because at least some federal appeals courts believe that they are precluded from even *considering* whether fees should be awarded to prevailing plaintiffs and prevailing defendants on an evenhanded basis, the lower courts are unlikely -- in the absence of intervention from this Court -- to pay serious attention to the issue of whether Congress really intended to create such economic incentives. Clarification of this important issue of federal law is urgently needed.

B. The Underlying Statute. Congress adopted EPCRA in 1986 as a means of improving the emergency response capabilities of local communities in the event that excessive quantities of toxic substances were suddenly released into the environment. To ensure that local communities have the information needed to respond quickly to such events, EPCRA requires that users of specified toxic chemicals report annually on the quantity of such chemicals they possess. *See* EPCRA § 312, 42 U.S.C. § 11022. Facilities from which specified chemicals are released into the environment are required by

EPCRA § 313, 42 U.S.C. § 11023, to file annual reports detailing such releases.[1]

As the Court has noted, "Enforcement of EPCRA can take place on many fronts." *Steel Co. v. Citizens for a Better Environment* ["*CBE*"], 523 U.S. 83, 87 (1998). Congress clearly contemplated that the filing of citizen suits of the type at issue here would be but one of several methods of enforcing EPCRA. The "most powerful [EPCRA] enforcement arsenal" belongs to EPA. *Id.* It may seek criminal, civil, or administrative penalties against facilities that neglect their reporting responsibilities. 42 U.S.C. § 11045. State and local governments can also seek civil penalties, as well as injunctive relief. 42 U.S.C. § 11046(a)(2) and (c). A third enforcement mechanism, and the one at issue in this action, is a citizen suit brought by "any person" against, *inter alia*, the owner or operator of a facility that fails to file inventory forms and toxic chemical release forms required under 42 U.S.C. §§ 11022 and 11023.

Congress imposed a number of limitations on citizen suits that are not applicable to suits filed by federal officials. In particular, 42 U.S.C. § 11046(d)(1) provides that no citizen suit may be initiated against the owner or operator of a facility "prior to 60 days after the plaintiff has given notice of the alleged violation to [EPA], the State in which the alleged violation occurs, and the alleged violator." Moreover, no such suit may be filed if EPA "has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under [EPCRA] with respect to the violation of the

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[1] EPCRA itself imposes no limitations on such releases. Release of chemicals into the environment is, of course, subject to regulation under a wide range of federal environmental statutes. CBE has never alleged that The Steel Company failed to comply with any of those other statutes.

requirement." 42 U.S.C. § 11046(e). Also, while the relief available in a citizen suit includes payment of a civil penalty (42 U.S.C. § 11046(c)), such penalties are paid to the federal government, not to the individual initiating the citizen suit.

Congress also included a fee-shifting provision: a district court hearing a citizen suit brought pursuant to EPCRA "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines that such an award is appropriate." 42 U.S.C. § 11046(f). Notably, the fee-shifting provision provides no indication that fee applications from prevailing defendants and fee applications from prevailing plaintiffs are to be subject to different standards. EPCRA's legislative history provides little to no indication regarding why Congress adopted the fee-shifting provision. The language used in the fee-shifting provision is, however, substantially similar to language used in fee-shifting provisions included in environmental statutes adopted in the 15 years prior to adoption of EPCRA in 1986. Those earlier fee-shifting provisions have generally been viewed as designed to provide an incentive to citizens to file meritorious citizen suits and as an incentive to defendants in such actions to stand by meritorious defenses.

Among the private organizations that have decided to seek an active role in EPCRA litigation is Respondent Citizens for a Better Environment ("CBE"), a non-profit environmental advocacy group headquartered in Chicago. CBE has filed scores of successful suits against companies it alleged not to be in compliance with EPCRA. Citizens for a Better Environment, *Environmental Review* (Fall 1997). CBE is well equipped to pursue extensive EPCRA litigation. In 1995 when it filed this suit, CBE had over 30,000 members and 180,000 contributors. Complaint ¶ 6.

C. Proceedings Below. Petitioner The Steel Company is a small, minority-owned manufacturer and pickler of steel located in the southeast side of Chicago. Its manufacturing processes require it to inventory and release into the environment under permit and pursuant to various regulatory schemes, certain chemicals covered by EPCRA.

On March 16, 1995, CBE gave notice -- pursuant to 42 U.S.C. § 11046(d) -- to The Steel Company, the Environmental Protection Agency, and Illinois authorities that: (1) it believed that The Steel Company had violated EPCRA §§ 312 and 313, 42 U.S.C. §§ 11022 and 11023, by failing to file inventory forms and toxic chemical release forms required by those provisions; and (2) it contemplated filing suit against The Steel Company for those alleged violations. On August 7, 1995, CBE filed its complaint in the District Court for the Northern District of Illinois. It is uncontested that as of August 7, 1995, The Steel Company had filed all forms required of it by EPCRA.

The district court thereafter granted The Steel Company's motion to dismiss for failure to state a claim upon which relief could be granted; the Steel Company had also alleged absence of subject matter jurisdiction. The district court held that the EPCRA citizen-suit provision did not concern itself with historical reporting-requirement violations.

On appeal, the Seventh Circuit reversed and remanded for further proceedings. *CBE v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), *vacated,* 523 U.S. 83 (1998). The court held that EPCRA authorizes citizen suits not only for failure to complete and submit forms, but also for failure to do so in a timely manner. *Id.* at 1243. The court did not address the issue of whether CBE had Article III standing and thus whether the federal courts had subject matter jurisdiction to consider the merits of CBE's claims.

In March 1998, this Court unanimously vacated the Seventh Circuit's judgment and remanded with instructions to

direct that the complaint be dismissed. *Steel Co. v. CBE*, 523 U.S. 83 (1998). Six justices held that CBE lacked Article III standing because its requested relief would not redress the injuries CBE claimed to have suffered. *Id.* at 105-09; *id.* at 111-12 (Breyer, J., concurring in part and concurring in the judgment). The other three justices stated that EPCRA does not permit citizen suits for wholly past violations and would have reversed on that ground without reaching the standing issue. *Id.* at 131-33 (Stevens, J., joined by Souter, J., concurring in the judgment); *id.* at 134 (Ginsburg, J., concurring in the judgment).

Following the district court's entry of a judgment of dismissal, The Steel Company on December 29, 1998 filed a motion pursuant to 42 U.S.C. § 11046(f) for an award of attorney fees and non-taxable expenses.[2] CBE responded to the motion by asserting that, in view of the Supreme Court's determination that CBE lacked Article III standing and thus that the federal courts lacked subject matter jurisdiction to decide the merits of CBE's EPCRA claims, the district court lacked subject matter jurisdiction to consider The Steel Company's fee request. CBE's response also asserted that the fee request should be denied for two other reasons: (1) The Steel Company was not a "prevailing party" within the meaning of 42 U.S.C. § 11046(f), because it prevailed only on a jurisdictional issue, not on the merits of CBE's EPCRA claims; and (2) a prevailing defendant in an EPCRA action is entitled to a fee award only if the lawsuit was "frivolous," and CBE's suit was not frivolous.

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[2] Before the motion was filed, the parties -- as a result of the negotiations process mandated by local court rules -- stipulated that The Steel Company's reasonable attorney fees amounted to $250,567.04, and reasonable non-taxable costs amounted to $19,641.57, for a total of $270.208.61.

In its June 8, 1999 Memorandum and Opinion, the district court held that it lacked jurisdiction to consider the fee petition. App. 21a-26a. The court held that once a federal court determines that a suit was improperly filed because the court lacks subject matter jurisdiction over the case, its authority over the parties ceases and it has no power to award attorney fees. *Id.* The court did not address CBE's other two arguments: that fees were unwarranted because The Steel Company was not a "prevailing" party and because CBE's suit was not frivolous.

In its appeal, The Steel Company requested the Seventh Circuit to address all three issues. The appeals court did so, siding with The Steel Company on the first two issues but with CBE on the third -- and thereby affirming the district court's denial of the fee petition. The appeals court held initially that the trial court erred in determining that its lack of jurisdiction over CBE's claim deprived it of jurisdiction over The Steel Company's fee petition. App. 3a-11a. The appeals court explained, "[A] court may lack authority to resolve the merits of a claim yet have jurisdiction to award costs and attorneys' fees to the prevailing party." App. 3a.

The appeals court next determined that The Steel Company was the prevailing party in this action. App. 11a-13a. The court said that The Steel Company should be deemed to have "prevailed" in this suit because:

> [T]he Supreme Court's decision in this case . . . terminated this suit and barred all others like it, for as long as [EPCRA] retains its current language. It was a triumph in the war, not just in a battle or even a campaign.

App. 12a.

The appeals court nonetheless affirmed the district court's decision because it determined that prevailing EPCRA defendants may not obtain fee awards under § 11046(f) unless they can show that "the suit was frivolous, unreasonable, or

pursued in bad faith." App. 15a. The court held that The Steel Company failed to meet that standard: "Misconceived this suit was. Frivolous it was not." *Id.* The court explained that its adoption of a "frivolous, unreasonable, or pursued in bad faith" standard was mandated by this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). *Id.*

According to the appeals court, *Delaware Valley* held that issues arising under environmental fee-shifting laws in all instances should be treated "in the same manner" and "should be governed by the same principles as fee shifting under [civil rights laws]." *Id.* at 14a. Because this Court held in *Christiansburg* that a dual standard should be applied in civil rights cases and that prevailing defendants in such cases should be awarded fees only when the suit was frivolous, unreasonable, or pursued in bad faith, the appeals court felt itself bound by *Delaware Valley* to apply that same standard to environmental cases. *Id.* at 15a. The appeals court concluded, "Until the Supreme Court suggests otherwise, this court must read 'in the same manner' to mean just that." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to the thousands of businesses that each year find themselves the target of citizen suits filed under the federal environmental laws: under what circumstances are they permitted to recover their attorney fees when they prevail in such cases? According to the Seventh Circuit, the answer to that question is, "virtually never." If that answer is correct, companies will continue to be placed under enormous pressure to settle such suits by succumbing to the plaintiffs' financial demands -- regardless how lacking in merit they judge a lawsuit to be.

Yet, the Seventh Circuit arrived at its answer without examining The Steel Company's arguments. The Seventh

Circuit stated that its answer -- that prevailing defendants in environmental citizen suits may recover fees only where the suit was "frivolous, unreasonable, or pursued in bad faith" -- was mandated by this Court's precedent. The only other appeals court to address the issue directly, the Ninth Circuit, deemed itself similarly constrained by this Court's precedents. *Marbled Murrelet v. Pacific Lumber Co.*, 182 F.3d 1091 (9th Cir. 1999), *cert. denied*, 112 S.Ct. 933 (2000).[3]

As The Steel Company will demonstrate below, the Court's precedents impose no such constraints; the Court has never previously considered whether courts should apply a dual standard or an evenhanded standard in fee requests arising under federal environmental statutes. But because, for whatever reason, the appeals courts do not feel at liberty to address the issue themselves, this Court is the only possible source of guidance on the issue.[4] That guidance is urgently needed, both because of the large increase in environmental citizen suits in recent years and because application of a dual standard to fee-shifting issues has transformed such suits from the supplemental enforcement mechanism envisioned by Congress into a shakedown system under which companies must pay tribute to environmental groups as a cost of doing business.

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[3] Indeed, prior to *Delaware Valley*, the Ninth Circuit had adopted an evenhanded standard for awarding fees in environmental citizen suits. *Carson-Truckee Water Conservancy Dist. v. Secretary of Interior*, 748 F.2d 523 (9th Cir. 1984), *cert. denied*, 471 U.S. 1068 (1985). *Marbled Murrelet* held that *Carson-Truckee* had been overruled *sub silentio* by *Delaware Valley* and thus was no longer good law within the Ninth Circuit. *Marbled Murrelet*, 182 F.3d at 1095.

[4] Indeed, the Seventh Circuit appeared to invite the Court's intervention, stating that it would apply *Christiansburg*'s dual standard to environmental fee-shifting statutes "[u]ntil the Supreme Court suggests otherwise." App. 15a.

I. THE APPEALS COURTS ARE UNDER THE MISTAKEN IMPRESSION THAT *DELAWARE VALLEY* DIRECTS THEM TO APPLY THE *CHRISTIANSBURG* DUAL STANDARD IN ENVIRONMENTAL CITIZEN SUITS

Review of this case is warranted because the federal appeals courts have been confused by this Court's decision in *Delaware Valley*. The appeals courts have interpreted *Delaware Valley* as precluding them from considering any arguments against application of the *Christiansburg* dual standard in environmental citizen suits. That misinterpretation has prevented the appeals courts from examining the significant differences between federal laws authorizing individuals to sue to enforce civil rights statutes and laws authorizing citizen suits to enforce federal environmental laws.

Delaware Valley provides no support for a dual fee-award standard and never even discussed awards to prevailing defendants. The case involved an effort by prevailing plaintiffs in a Clean Air Act citizen suit (brought pursuant to § 304(d) of the Act, 42 U.S.C. § 7604(d)) to recover attorney fees. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The district court's decision that the plaintiffs were entitled to a fee award was not before this Court; the case dealt solely with the proper size of the award.

One issue before the Court was whether the district judge erred in awarding fees to the plaintiffs for work done in post-trial administrative proceedings. The Court rejected arguments by Pennsylvania that fees incurred in administrative proceedings were not properly awardable because such fees were not "costs of litigation" within the meaning of § 304(d) of the Act and were not part of the "action" for which fees were awardable. In arriving at that conclusion, the Court explained, "[T]he work done by counsel in these two [post-

trial] phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree." *Id.* at 558. The Court added, "In a case of this kind, measures necessary to enforce the remedy ordered by the District Court cannot be divorced from the matters upon which Delaware Valley prevailed in securing the consent decree." *Id.* at 558-59.

Only after determining that post-trial administrative work was indistinguishable -- for fee-award purposes -- from work performed at trial did the Court look for support to case law decided under civil rights fee-shifting statutes. The Court noted that several cases decided under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, held that prevailing civil rights plaintiffs are entitled to recover, as part of their "reasonable" fee, time devoted to the post-judgment monitoring of a consent decree. *Id.* at 559. The Court said that those cases supported its view that the respondent was entitled to recover fees for its post-trial work. The Court said, "Given the common purpose of both § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Id.* at 560.

The Seventh Circuit seized upon *Delaware Valley*'s use of the phrase "in the same manner" to rule that it was bound by that decision to apply *Christiansburg*'s dual standard to fee requests in environmental citizen suits. App. 15a. Its conclusion in that regard was wholly unwarranted. We note initially that, contrary to the appeals court's conclusion (App. 14a), *Delaware Valley*'s discussion of similarities between civil rights suits and environmental citizen suits was purely *dictum*. The Court did not begin that discussion until after it had rejected Pennsylvania's argument that work performed by Delaware Valley in post-trial administrative proceedings could

be distinguished meaningfully from work performed in the trial court. *Id.* at 557-59.

More importantly, nothing in *Delaware Valley* suggests that the Court had examined all of the purposes of civil rights fee-shifting statutes and determined that they were identical to all of the purposes of environmental citizen suit fee-shifting statutes. Rather, the Court merely determined that they shared at least one common purpose: to encourage citizens to bring meritorious suits that they might not otherwise be in a position to bring. *Id.* at 560-61. In particular, the Court did not discuss Congress's purpose in permitting prevailing civil rights and environmental *defendants* to obtain fee awards in "appropriate" cases.

Accordingly, the Court's decision to supply a uniform interpretation to environmental and civil rights fee-award provisions in this single instance says nothing about whether the Court would also provide a uniform interpretation in the totally unrelated context of fee requests by prevailing defendants. Such fee requests raise a significantly different set of considerations. As we demonstrate below, the purposes underlying fee-shifting provisions in environmental statutes are different in several key respects from the purposes underlying civil rights fee-shifting provisions. Nothing in *Delaware Valley* suggests that the Court intended to prohibit Courts from taking those differences into consideration when determining the proper standards for awarding fees to prevailing defendants.[5]

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[5] *Delaware Valley* returned to the Court a second time in 1987, when it was asked to determine the circumstances under which fees could be awarded at a rate above the "lodestar fee" (*i.e.*, the fee determined by multiplying the attorneys' reasonable hourly rates times the number of hours reasonably devoted to the case). *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* [*Delaware Valley II*], (continued...)

Both the Seventh Circuit and the Ninth Circuit clearly misread *Delaware Valley* and *Delaware Valley II* when they determined that those decisions require them to apply the *Christiansburg* dual standard to fee requests from prevailing defendants in environmental cases, without regard to the differing purposes underlying civil rights fee-shifting statutes and fee-shifting statutes in environmental citizen suits. The Court should grant review in order to correct that error and to make clear that it has not foreclosed lower courts from taking such differences into consideration.

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[5](...continued)
483 U.S. 711 (1987). Before addressing that issue, the Court said the following in a footnote at the end of the initial paragraph of its decision:

> Last term in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), we agreed with the Court of Appeals that in awarding attorney's fees under § 304(d) [of the Clean Air Act] the courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988, which provides that in the actions specified in that section "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Delaware Valley II, 483 U.S. at 713 n.1. Although the remainder of the Court's discussion of the fee "enhancement" issue includes several citations to civil rights cases, there is no indication in *Delaware Valley II* that any of those cases played a decisive role in either the plurality opinion or the concurring opinion. Nor is there any indication that either party thought that differences between fee-shifting provisions under environmental laws and fee-shifting provisions under civil rights laws were relevant to the fee "enhancement" issue before the Court. Accordingly, *Delaware Valley II*'s extremely brief discussion of what *Delaware Valley* had said about parallels between environmental citizen suits and private suits brought under civil rights laws cannot be deemed to have created any new law.

II. THE SEVENTH CIRCUIT ERRED IN ADOPTING A DUAL STANDARD IN DETERMINING WHETHER AN AWARD OF FEES IS "APPROPRIATE" UNDER § 11046(f)

A. The Plain Language of § 11046(f) Indicates That Defendants and Plaintiffs Are To Be Treated Alike with Respect to Fee Petitions

The most basic issue that a court must face in addressing a fee petition is whether the standards for making an award differ depending on whether the prevailing party is a defendant or a plaintiff. The plain language of § 11046(f) makes clear that the answer to that question is *no*, it makes no difference -- the same standards ought to come into play in making a fee determination whether the prevailing party is a defendant or a plaintiff. Section 11046(f) provides that "costs of litigation (including reasonable attorney and expert witness fees)" may be awarded to "the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." Congress's use of the term prevailing "party" is an unmistakable indication that Congress intended to permit fee awards to prevailing defendants and plaintiffs alike. Moreover, the standard established by Congress for such awards is precisely the same for *all* prevailing "part[ies]" -- such awards are called for whenever the district judge determines that "such an award is appropriate."

Despite the plain language of § 11046(f), the Seventh Circuit nonetheless adopted a dual standard in EPCRA fee-award cases. App. 15a. The appeals court did so without examining the language of § 11046(f). Rather (as noted above), the appeals court held that a dual standard was mandated by *Delaware Valley*. The Court should grant review to correct the Seventh Circuit's clear error of federal statutory interpretation. Review is particularly warranted

because this issue is one that will recur with increasing frequency, in light of the increasing number of environmental citizen suits being filed in the federal courts.

The appeals court's decision is inconsistent with a recent decision of this Court involving the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. § 505. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), a songwriter prevailed in a copyright infringement suit brought against him. Applying the *Christiansburg* dual standard, the lower courts denied the songwriter's subsequent attorney fee request.

This Court unanimously reversed, finding that the Copyright Act required fee petitions from prevailing defendants and fee petitions from prevailing plaintiffs to be placed on equal footing. *Id.* at 534.[6] In arriving at that conclusion, the Court focused principally on the language employed in the Act's fee-shifting provision:

> The statutory language -- "the courts may also award a reasonable attorney's fee to the prevailing party as part of the costs" -- gives no hint that successful plaintiffs are to be treated differently from successful defendants.

Id. at 522.[7] The language employed by § 11046(f) is identical in all relevant respects to the language employed by the Copyright Act's fee-shifting statute; in each case, the statute "gives no hint that successful plaintiffs are to be treated differently from successful defendants." Accordingly, *Fogerty*

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[6] The Court referred to that standard as an "evenhanded standard," and a standard that gives preference to prevailing plaintiffs over prevailing defendants as a "dual standard." *Id.* at 534 & n.19. The Steel Company employs that same terminology herein.

[7] The Court indicated that district courts would be afforded considerable latitude in the factors they consider in making fee awards, "so long as such factors are faithful to the purposes of the Copyright Act and *are applied to prevailing plaintiffs and defendants in an evenhanded manner.*" *Id.* at 534 n.19 (emphasis added).

mandates that § 11046(f) be interpreted as adopting an "evenhanded standard," whereby The Steel Company's fee petition is to be treated no differently than if The Steel Company had happened to be a prevailing plaintiff. The Court should grant review in order to resolve the conflict between *Fogerty* and the decision below.

B. *Christiansburg*'s Dual Standard Is Inapplicable in This or Any Other Environmental Case

The Court has adopted a dual standard in civil rights cases: prevailing plaintiffs in civil rights cases are presumptively entitled to fee awards, while prevailing defendants are entitled to fees only if they can demonstrate that the plaintiff's suit was "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421. Moreover, the Court has done so based on fee-shifting provisions whose language is virtually identical to the provision at issue in *Fogarty* and to the fee-shifting provision contained in nearly every environmental statute. This case ultimately boils down to the following issue: should construction of fee-shifting provisions in EPCRA and other environmental statutes be guided by *Christiansburg* or by *Fogerty*? The Steel Company respectfully submits that this case has far more in common with *Fogerty* than with *Christiansburg* and thus that application of an evenhanded fee standard is appropriate. Review is warranted in order to resolve this important issue, an issue that this Court has not previously addressed.

In declining to expand the *Christiansburg* dual standard outside the context of civil rights cases, *Fogerty* acknowledged that the Copyright Act fee-shifting provision is nearly identical to the fee-shifting provision contained in virtually all civil rights statutes. The Court gave two reason for its decision not to apply *Christiansburg* in Copyright Act cases.

First, it determined that the legislative history of the civil rights statutes indicated that Congress intended to create a dual standard for fee awards, while no such indication appeared in the Copyright Act's legislative history. *Id.* at 523-24. Second, the Court determined that the "goals and objectives" of the Copyright Act are not similar to those of the civil rights statutes. *Id.* at 524. The Court noted, for example, that many civil rights plaintiffs are "impecunious" and that Congress intended to "redress the balance in part" between poor plaintiffs and "defendants with more resources" "by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney fees" -- and thereby encourage the filing of more civil rights suits. *Id.* In contrast, the Court noted, Copyright Act plaintiffs are far less likely than civil rights plaintiffs to be poor; "[e]ntities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists." *Id.* Also, the Court noted that while the overriding goal of the civil rights statutes is to maximize the number of meritorious suits filed by injured plaintiffs, "the policies served by the Copyright Act are more complex, more measured." *Id.* at 526. The Court said that the Act "ultimately serves the purpose of enriching the general public through access to creative works," and that that purpose is best served not by encouraging numerous infringement suits but by ensuring that "the boundaries of copyright law [are] demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.* at 527.

The rationales that led *Fogerty* to decline to apply the *Christiansburg* dual standard in Copyright Act cases are equally applicable in the environmental law context. First, the legislative history of EPCRA contains no suggestion that Congress -- despite its clear statutory language suggesting an

evenhanded approach -- intended to adopt a dual standard in fee awards. Indeed, the legislative history of related environmental laws suggests just the opposite. Second, the goals and objectives of the citizen suit provisions of EPCRA and other environmental statutes are not at all similar to those of the civil rights statutes; those goals and objectives are not compatible with the dual standard adopted by the appeals court.

1. The Legislative History of EPCRA and Related Environmental Statutes Does Not Support Adoption of a Dual Standard

The fee provision at issue in *Christiansburg* was 706(k) of Title VII of the Civil Rights Act of 1964, which permits district courts in their discretion to "allow the prevailing party . . . a reasonable attorney's fee." The Court relied on § 706(k)'s legislative history to conclude that § 706(k) -- despite its seemingly neutral language -- mandated a dual fee-award standard. *Christiansburg,* 434 U.S. at 420. Noting that Congress adopted § 706(k) to encourage the filing of meritorious Title suits, the Court stated that granting attorney fees to prevailing Title VII defendants on a routine basis would undercut that purpose because it "would substantially add to the risks inherent in most litigation." *Id.* at 422.

CBE has been unable to point to *any* provision in EPCRA's legislative history indicating that EPCRA's fee-shifting provision was similarly designed to maximize the number of citizen suits. The legislative history of other environmental statutes suggests that fee-shifting provisions were added as a means of assisting prospective *defendants*, not prospective plaintiffs. Indeed, in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Court arrived at precisely that conclusion regarding the fee-shifting provision of the Clean Air Act Amendments of 1970, the first environmental statute

to include a fee-shifting provision. After reviewing the legislative history of the Clean Air Act, the Court concluded:

> The central purpose of § 304(d) [the Clean Air Act's fee-shifting provision] was to check the multiplicity of potentially meritless suits, that Congress feared would follow the authorization of [citizen] suits under the Clean Air Act, which was seen as an unprecedented innovation.

Ruckelshaus, 463 U.S. at 692-93 (internal quotations omitted).

Because the "central purpose" of fee-shifting provisions in environmental statutes is to cut down on the number of meritless citizen suits being filed, such provisions cannot fairly be interpreted as favoring plaintiffs over defendants. As the Court has noted, "One might well imagine the surprise of the legislators who voted for this section as an instrument for deterring meritless suits upon learning that instead it could be employed to fund such suits." *Id.* at 693.

2. The Goals and Objectives of EPCRA Do Not Support Adoption of a Dual Standard

Christiansburg's determination that a dual standard should be applied to fee awards in civil rights cases was based in large measure on the goals and objectives of the civil rights laws. The goals and objectives of the EPCRA citizen suit provision and other environmental law citizen suit provisions are far different from those of Title VII and other civil rights laws, and do not provide any basis for incorporating *Christiansburg*'s dual standard into the environmental sphere.

The Court's principal justification for adopting a dual fee-award standard in cases brought by individuals under Title VII was its perception that the plaintiff in such suits "is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority." *Christiansburg*, 434 U.S. at 418 (citation omitted). The Court explained that

the special role filled by Title VII plaintiffs justified adoption of a dual standard on fee-award issues as a means of encouraging suits by all plaintiffs with meritorious Title VII claims. *Id.* at 416-19.

That rationale for adopting a dual fee-award standard is inapplicable to plaintiffs bringing citizen suits under EPCRA or other environmental statutes. Such plaintiffs are *not* Congress's "chosen instrument[s]" for enforcing EPCRA. Rather, Congress placed primary enforcement responsibility on the federal government, which was given the power to seek criminal, civil, or administrative penalties against facilities that neglect their reporting responsibilities. 42 U.S.C. § 11045. *Steel Co. v. CBE*, 523 U.S. at 87 (the "most powerful [EPCRA] enforcement arsenal" belongs to the federal government). States and local governments also have significant enforcement powers. 42 U.S.C. § 11046(a)(2) and (c).

Citizen suits were assigned a secondary role in the EPCRA enforcement matrix -- as evidenced by a statutory provision barring citizen suits if the federal government decides to bring its own enforcement action. Indeed, anyone contemplating an EPCRA citizen suit must provide 60 days' advance notice of the suit to the federal government, the State in which the alleged violation is occurring, and the alleged violator. 42 U.S.C. § 11046(d)(1). That notice requirement provides the federal government an opportunity to investigate the complaint and to decide whether to bring its own enforcement action. If after investigating the complaint, the federal government decides to pursue EPCRA enforcement action, the prospective citizen-plaintiff is barred from bringing suit. 42 U.S.C. § 11046(e).

Many other federal environmental statutes contain 60-day notice provisions and exclusive-federal-enforcement provisions similar to EPCRA's. Such provisions have been interpreted by the Court on at least two occasions as evidence both that Congress viewed the federal government as the

principal enforcer of the environmental law at issue and that Congress wished to avoid excessive numbers of citizen suits. In *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), the Court relied on the 60-day notice requirement and the exclusive-federal-enforcement mandate in the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(f), to hold that individuals could not sue for wholly past violations of the Act. The Court explained:

> The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. . . . Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit.

Gwaltney, 484 U.S. at 60. Similarly, the Court held that the 60-day notice requirement of the citizen suit provision of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(b)(1), imposes an absolute bar to suit by individuals who have failed to comply with its terms. *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). The Court held that requiring compliance with the 60-day notice requirement "allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits," and thereby serves Congress's intent "to strike a balance between encouraging citizen enforcement of environmental regulations and *avoiding burdening the federal courts with excessive numbers of citizen suits*." *Id.* at 29 (emphasis added).

Moreover, Congress declined to give private citizens any personal monetary stake in their EPCRA enforcement actions. While prevailing plaintiffs in civil rights actions are eligible for substantial damage awards, Congress specified that any civil penalty imposed on the defendant in an EPCRA citizen suit would be paid to the federal government, not the plaintiff. 42 U.S.C. § 11046(c). The absence of any "bounty"

provision in EPCRA is inconsistent with a claim that citizen-suit plaintiffs are Congress's "chosen instrument[s]" for EPCRA enforcement.

In sum, while encouraging meritorious EPCRA citizen suits was obviously one reason that Congress provided for the award of attorney fees to prevailing parties in such suits, the principal factor that led the Supreme Court in *Christiansburg* to adopt a dual fee-award standard in Title VII cases -- a recognition that Title VII plaintiffs are Congress's "chosen instrument" for eradicating invidious discrimination in the workplace -- is wholly absent from EPCRA citizen suits.

Another consideration that animated *Christiansburg's* decision to adopt a dual fee-award standard was a recognition that most civil rights plaintiffs are individuals of limited means (*Christiansburg*, 434 U.S. at 420) who would face financial disaster if forced to pay attorney fees to a prevailing defendant. The Court recognized that, due to those potential financial consequences, placing prevailing defendants' fee petitions on an equal footing with those of prevailing plaintiffs would largely negate the intent of fee-shifting provisions to encourage the filing of meritorious civil rights claims:

> To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.

Id. at 422.

The impoverished-plaintiff scenario envisioned by *Christiansburg* as the rationale for a dual fee-award standard in civil rights cases is of little relevance in environmental citizen-suit litigation, where the typical plaintiff is a well-established environmental group that brings numerous such actions. CBE fits that description precisely. In 1995, CBE had over 30,000 members and 180,000 contributors.

Complaint ¶ 6. According to one of its publications, CBE has successfully prosecuted numerous suits under EPCRA and other federal environmental statutes. Citizens for a Better Environment, *Environmental Review* (Fall 1997).

An examination of reported decisions under environmental citizen-suit statutes demonstrates that virtually no plaintiffs in such cases are individuals. For example, citizen suits brought under EPCRA against non-governmental defendants have resulted in reported decisions in nine cases. In eight of those cases, the plaintiff was an environmental organization.[8] Only one of those cases was filed on behalf of an individual.[9] One environmental group, the Atlantic States Legal Foundation, brought three of the nine cases.[10] An EPA

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[8] In addition to this case, the other seven are *Atlantic States Legal Found. v. United Musical Instruments*, 61 F.3d 473 (6th Cir. 1995); *Neighbors for Toxic-Free Community v. Vulcan Materials Co.*, 964 F. Supp. 1448 (D. Colo. 1997); *Idaho Sporting Congress v. Computrol*, 952 F. Supp. 690 (D. Id. 1996); *Don't Waste Arizona v. McLane Foods*, 950 F. Supp. 972 (D. Az. 1996); *Atlantic States Legal Found. v. Buffalo Envelope Co.*, 823 F. Supp. 1065 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132 (E.D. Pa. 1993); and *Atlantic States Legal Found. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991).

[9] *Williams v. Leybold Technologies*, 784 F. Supp. 765 (N.D. Cal. 1992).

[10] A Westlaw party search revealed that 45 of the citizen suits brought by Atlantic States Legal Foundation (ASLF) under a variety of environmental statutes since 1984 have resulted in reported court decisions. ASLF claims to have litigated "hundreds of successful EPCRA and Clean Water Act cases." Samuel H. Sage and David W. Clippinger, *Holding Business Accountable*, POLLUTION PREVENTION REVIEW (Spring 1996) at 65. It also claims, "ASLF pioneered citizen enforcement of EPCRA in 1989 and remains the only public interest group in the country that routinely and systematically pursues EPCRA (continued...)

study of intent-to-sue letters filed under the Clean Water Act's citizen suit provision between May 1984 and September 1988 revealed that two-thirds were filed by large environmental organizations; between 1982 and April 1984, five national organizations accounted for 80% of all such notices. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 353-54 (1990). As the Supreme Court noted in *Hallstrom*, "While the initial charge in a Title VII proceeding is normally filed by an aggrieved individual, . . . citizen suits under RCRA are like any other lawsuit generally filed by trained lawyers who are presumed to be aware of statutory requirements." *Hallstrom*, 493 U.S. at 28.

The possibility that an adverse judgment could result in such organizations having to pay the opposing party's attorney fees is unlikely to deter them from filing meritorious environmental lawsuits.[11] To illustrate the point, assume that

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[10](...continued)
violators." *Id.* at 64.

[11] *Fogerty* cited the absence of the impoverished-plaintiff scenario in the typical copyright action as a reason for refusing to expand *Christiansburg*'s dual fee-award standard to copyright actions. The Court explained:

> Oftentimes, in the civil rights context, impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees. . . . In the copyright context, it has been noted that entities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists; the same is true of prospective copyright infringement defendants.

(continued...)

a plaintiff concludes that his contemplated lawsuit has an 80% chance of success, and that the statute under which he plans to sue has a fee-shifting provision. A suit with that high a likelihood of success clearly would qualify as one that Congress intended to encourage. But if a civil rights plaintiff of modest means faced the prospect that he would have to pay the defendant's legal bills if he lost the case, he might well decide not to sue -- he would be reluctant to risk his life savings no matter how strongly he believed in his case. On the other hand, an environmental group that regularly litigates is able to spread the risk of an adverse fee award over a large number of cases. If an evenhanded fee-award standard were adopted in environmental cases, then an environmental group that only brought cases it accurately judged to have an 80% chance of success would likely have at least four fee awards go in its favor for every one that went against it.

Thus, if an evenhanded standard were adopted, the fee-shifting provisions of EPCRA and other environmental laws would still provide a substantial monetary incentive for the filing of meritorious citizen suits. Of course, an evenhanded standard would eliminate all incentive to file suits that the plaintiff calculates as having a less-than-50-percent chance of success; but there is nothing in EPCRA or its legislative history to suggest that Congress intended to encourage such suits. In fact, limiting citizen suits to those with a better-than-50% chance of success advances the congressional goal that citizen suits "supplement" federal enforcement and not "overly burden" the federal judiciary, as articulated by the Court in *Gwaltney* and *Hallstrom,* respectively.

In sum, the *Christiansburg* Court's fear that adoption of an evenhanded fee-award standard would discourage would-be

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[11](...continued)
Fogerty, 510 U.S. at 524 (citation omitted).

civil rights plaintiffs of limited means has no bearing on environmental cases -- where virtually all plaintiffs are environmental groups that can spread the risk of loss over a large number of cases. The Court should grant review in order to address whether these stark differences between civil rights cases and environmental citizen suits mandate adoption of differing fee-award standards.

III. THE DUAL FEE-AWARD STANDARD HAS TRANSFORMED CITIZEN SUITS FROM THE SUPPLEMENTAL ENFORCEMENT MECHANISM ENVISIONED BY CONGRESS INTO A SYSTEM UNDER WHICH COMPANIES ARE FORCED TO PAY TRIBUTE TO ENVIRONMENTAL GROUPS AS A COST OF DOING BUSINESS

As noted above (*supra* 5-6, 21-24), Congress placed primary responsibility for enforcement of EPCRA in EPA's hands, with citizen plaintiffs relegated to a much smaller, secondary role. Indeed, as the Court explained in *Ruckelshaus,* Congress added attorney fee provisions to environmental citizen suit statutes at the behest of those who feared that companies might become overwhelmed by environmental citizen suits; attorney fee provisions were seen as a means of reducing the number of unmeritorious suits. *Ruckelshaus*, 463 U.S. at 692-93.

Adoption of a dual fee-award standard has had precisely the opposite effect from that intended by Congress. The standard has provided environmental groups with financial incentives to file numerous suits of even doubtful merit. Under the dual standard, those groups can rest assured that they will never be assessed fees for filing unmeritorious lawsuits, provided only that they can demonstrate that the suit was not "frivolous"; and they stand to be handsomely rewarded if they prevail. Defendants in such actions face a

vastly different set of financial incentives. If they contest what they view as unmeritorious citizen suits, they will incur substantial fees with little hope of recovering them even if they ultimately prevail. Moreover, there is always some risk that they will not prevail; accordingly, contesting the suits also risks the possibility that they will have to pay a substantial fine to the government as well as the environmental group's mounting fees. Thus, the dual standard places enormous pressure on defendants to settle environmental citizen suits, regardless how unmeritorious they view the suits to be. *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 120 S. Ct. 693, 719 (2000) (Scalia, J., dissenting) ("The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power--which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing.").

Numerous commentators have recognized that the environmental citizen suit regime has ceased being the supplemental enforcement mechanism envisioned by Congress. *See, e.g.*, Greve, *supra* at 339-45; Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, 11-SPG NAT. RESOURCES & ENV'T 20 (Spring 1997). Rather, there has been an "explosion" in the number of citizen suits over the past 15 years, fueled in no small degree by the dual fee-award standard that has resulted in the award of fees to prevailing plaintiffs as a matter of course. *Id.* As a result, a cottage industry has sprung up consisting of lawyers and affiliated environmental groups dedicated almost exclusively to -- and largely financed by fees derived from -- bringing such suits. *Id.*

The financial incentives created by the dual fee-award system has operated as one would expect: the great majority of environmental citizen suits are settled relatively quickly, with corporate defendants agreeing to make some form of

payment. Greve, at 355. Such payments generally include not only the plaintiff's attorney fees but also a cash payment to an environmental project of the plaintiff's choosing. *Id.* at 356.[12] While environmental groups, to avoid appearances of impropriety, have been unwilling to specify that the cash payment be made to the plaintiff, they have generally specified that the payments be made to an allied environmental group. *Id.* at 358-59.[13]

The Steel Company submits that the citizen suit regime outlined above -- which amounts to a large transfer payment from private industry to environmental groups with little evidence of benefit to the environment -- is not the one envisioned by Congress. There is considerable evidence that the current state of affairs has been brought about in large measure by judicial adoption of the dual fee-award system. Review is warranted in this case to determine whether adopting an evenhanded fee-award standard would correct the imbalance.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] Citizen suit defendants have generally been willing to make such payments as an alternative to the fine they would be required to pay to the federal government if found by the court to have violated an environmental statute. *Id.* at 356-57. Such payments generally are an attractive alternative because in practice they are considerably smaller than the potential fine and because, unlike a fine, they are tax deductible. *Id.*

[13] For example, the Atlantic States Legal Foundation, in reporting on its successful settlement of an EPCRA citizen suit against Silgan Containers Corp., stated that one of the settlement terms required Silgan to make a cash payment to Respondent Citizens for a Better Environment "for further pollution prevention work." Sage and Clippinger at 66.

Respectfully submitted,

Sanford M. Stein
Leo P. Dombrowski
WILDMAN, HARROLD,
ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Dated: January 16, 2001

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 99-2709
Citizens for a Better Environment,
Plaintiff-Appellee,

v.

The Steel Company, also known as
Chicago Steel and Pickling Company,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 4534--George M. Marovich, Judge.

Argued February 9, 2000--Decided October 17, 2000

Before Bauer, Easterbrook, and Ripple, *Circuit Judges*.

Easterbrook, *Circuit Judge*. The Steel Company missed reporting deadlines established by the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001-50. Notified of its default by Citizens for a Better Environment (CBE), The Steel Company quickly furnished all required documents. Nonetheless CBE filed suit under the Act's citizen-suit provision. 42 U.S.C. § 11046(a)(1). The Act authorizes a civil penalty of $25,000 per day per report for tardiness, 42 U.S.C. § 11045(c), and by the

complaint's calculations The Steel Company could have owed more than $537 million. The Steel Company replied that CBE is not entitled to pursue such a claim. A panel of this court rejected this argument without discussing CBE's standing, 90 F.3d 1237 (7th Cir. 1996), but the Supreme Court unanimously reversed. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Six Justices concluded that, even if delay in disclosure injured CBE, that injury could not be redressed given that any civil penalty would be paid to the United States rather than a private plaintiff; CBE therefore lacks a justiciable controversy with The Steel Company. 523 U.S. at 102-10. Three Justices concluded that Congress has authorized citizen suits only if the litigation begins before the firm files all required reports; these three did not decide whether CBE has standing. *Id.* at 131-34 (Stevens, J., joined by Souter & Ginsburg, JJ.).

It took three years and $270,000 in attorneys' fees for The Steel Company to convince the federal judiciary that CBE was whistling in the dark. After the Supreme Court's decision, we know that this suit never should have been filed. Now The Steel Company wants to be placed in the pecuniary position it would have occupied but for the suit. Accordingly, it moved in the district court for an award of attorneys' fees under § 11046(f), only to be told "no jurisdiction." 1999 U.S. Dist. Lexis 9042 (N.D. Ill. June 8, 1999). Though those words were music to its ears when sung by the Supreme Court, The Steel Company insists that this repeat is not in the score.

The district court thought that, if CBE lacks standing to seek civil penalties from The Steel Company, then The Steel Company must lack standing to seek attorneys' fees

from CBE. A court either has jurisdiction or it doesn't, the district judge believed, and the Supreme Court has put this case in the no-jurisdiction cubbyhole. Yet "[c]ourts that lack jurisdiction with respect to one kind of decision may have it with respect to another. See *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077-79 (7th Cir. 1987). A court, for example, always has jurisdiction to consider its own jurisdiction". *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988) (Breyer, J.). See also *Yang v. INS*, 109 F.3d 1185, 1192-94 (7th Cir. 1997). In particular a court may lack authority to resolve the merits of a claim yet have jurisdiction to award costs and attorneys' fees to the prevailing party. We held this in *Szabo Food Service*, and the Supreme Court agreed in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393-98 (1990), and *Willy v. Coastal Corp.*, 503 U.S. 131 (1992). In this very case the Supreme Court granted certiorari, held a hearing, and considered whether federal courts had jurisdiction to entertain the suit. The Court said no, and it had jurisdiction to say no. Article III of the Constitution authorized the proceedings in which the Court gave its answer. Article III allowed this court on remand to direct that the district court dismiss the suit. Article III allowed taxation of costs against CBE pursuant to 28 U.S.C. § 1919 in the Supreme Court and here on remand. Article III allows an award of other costs of litigation, including attorneys' fees, incurred in the proceedings. Although CBE lost because the judiciary could not redress any injury it suffered from The Steel Company's delay in filing the required reports, The Steel Company's injury (the costs of defending this litigation) assuredly may be redressed by an order requiring CBE to reimburse those expenses. That satisfies Article III. The Steel Company has only to

establish that federal law authorizes the district court to make the award.

The district court's conviction that it may not award attorneys' fees reflects a misunderstanding of what the Supreme Court said in this litigation about Article III. The Court concluded that CBE's prospect of recovering costs and legal fees if it prevailed on the merits could not justify adjudicating the question whether The Steel Company had violated the Act. "[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." 523 U.S. at 107. But a fee award *is* the substantive issue in The Steel Company's motion. It has been injured in fact to the tune of $270,000 and counting. CBE's suit inflicted that injury, which can be redressed by an award in The Steel Company's favor. Malicious prosecution and abuse of process are very old torts that reflect a defendant's entitlement to be made whole following wrongful litigation--including litigation so baseless that it does not even come within the jurisdiction of the court in which it was filed. Suppose a federal statute established the right to recover for loss caused by "wrongful invocation of federal jurisdiction," affording compensatory damages to defendants who have been dragged pointlessly through federal court. The constitutionality of such a provision could not be doubted, nor would anyone deny that the aggrieved former defendant has standing to avail itself of the federal right so created. Cf. 28 U.S.C. §§ 1495, 2513 (granting such a remedy to a criminal defendant who can establish innocence). That the aggrieved litigant invoked its entitlement by counterclaim rather than by an independent suit would not deprive the district court of authority to supply the remedy.

Until 1875 federal courts did not award either attorneys' fees or any other costs in cases that had been dismissed for want of jurisdiction. The reason lay in the common law, not the Constitution, the Court explained in *Mansfield C. & L.M. Ry. v. Swan*, 111 U.S. 379, 386-87 (1884). In considering the power conferred on circuit courts by the Act of March 3, 1875, 18 Stat. 470, 472, to award costs secured by a bond when remanding a suit to state court, the Court observed: "These provisions were manifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs." *Id.* at 387. *Mansfield* applied the new statute and held that costs may be awarded even when the court to which the action is removed lacks jurisdiction to decide the merits. The law applied in *Mansfield* is still on the books, now split into two and modified. One part appears in 28 U.S.C. § 1919:

> Whenever any action or suit is dismissed in any district court, the Court of International Trade, or the Court of Federal Claims for want of jurisdiction, such court may order the payment of just costs.

The other survives as 28 U.S.C. § 1447(c):

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

We applied this statute in *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407 (7th Cir. 2000), stating that attorneys' fees should be normal incidents of remands for lack of jurisdiction; none of the parties suggested that § 1447(c) violates Article III, and such a contention would have been untenable. Use of this fee-shifting power has been uncontroversial. See, e.g., *Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992); *Mints v. Educational Testing Service*, 99 F.3d 1253 (3d Cir. 1996); *W.H. Avitts v. Amoco Production Co.*, 111 F.3d 30 (5th Cir. 1997); *Stallworth v. Greater Cleveland RTA*, 105 F.3d 252 (6th Cir. 1997).

Willy noted that statutes such as § 1919 and 1447(c) permit awards of litigation expenses in suits that federal courts are not authorized to decide on the merits. *Cooter & Gell* held that Fed. R. Civ. P. 11 permits such awards in cases originally within the court's jurisdiction but voluntarily dismissed by plaintiffs before defendants seek fees. Then *Willy* generalized that approach by holding that attorneys' fees may be awarded under Rule 11 even if the case never came within the district court's subject-matter jurisdiction. The district court sought to distinguish these decisions:

> [A] court's authority to award attorney's fees or sanctions under Rule 11 is drawn not from the Constitution's Article III jurisdictional requirements, but rather congressional authority under Article I, § 8, cl. 9 to establish laws regulating the conduct of the courts. *Willy*, 503 U.S. at 136. The imposition of Rule 11 sanctions therefore is a procedural matter that is not restricted by Article III standing requirements. Here, the procedural concerns regarding abuse of the judicial system present in both *Willy* and *Cooter & Gell* are

> notably absent. As such, the Supreme Court's Rule 11 jurisprudence is not germane.

This passage confuses two concepts--legislative authority to create rights and remedies (located in Article I), and adjudicative authority (located in Article III). Article I conferred on Congress authority to enact not only 28 U.S.C. §§ 1919 and 1447(c), but also the Rules Enabling Act, 28 U.S.C. §§ 2071-77, which underpins Rule 11. That laws are enacted under Article I does not justify dispensing with standing requirements under Article III; courts possess no more authority to issue advisory opinions (or otherwise exceed their jurisdiction) in "procedural matters" than in other matters. Still, a motion seeking an award under any of these rules or statutes is a case or controversy that may be adjudicated to the extent the movant has suffered at its adversary's hands an injury [that] may be redressed by a decision in its favor. *Steel Co.*, 523 U.S. at 102-04. Article III therefore presents no obstacle to fee-shifting, whether or not the fees were incurred in proceedings that were cases or controversies under Article III. To see this, consider costs and attorneys' fees incurred in proceedings before administrative agencies. That the agency proceedings were not conducted under Article III does not preclude awards of costs and fees to the prevailing party, when legislation authorizes litigation to recoup those outlays. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (federal suit to recover legal expenses of state administrative and judicial proceedings enforcing Title VII of the Civil Rights Act of 1964); *Brown v. Griggsville Community Unit School District No. 4*, 12 F.3d 681 (7th Cir. 1993) (federal suit to recover attorneys' fees necessitated by state administrative proceedings under the IDEA). Not all statutes authorize claims of this kind; *North Carolina*

Department of Transportation v. Crest Street Community Council, Inc., 479 U.S. 6, 13-15 (1986), held that 42 U.S.C. sec.1988, unlike Title VII, does not support a suit whose sole object is to recover legal expenses incurred in nonjudicial proceedings. But this is a matter of statutory meaning, not of power to adjudicate, a distinction that the Supreme Court emphasized in this very case. 523 U.S. at 89-90.

The district court drew comfort for its position from decisions of other circuits. *Ass'n for Retarded Citizens v. Thorne*, 68 F.3d 547, 552 (2d Cir. 1995) (relying on *W.G. v. Senatore*, 18 F.3d 60 (2d Cir. 1994)); *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990); and *Branson v. Nott*, 62 F.3d 287, 292-94 (9th Cir. 1995), hold that defendants cannot obtain awards of fees under § 1988 if the district court lacked subject-matter jurisdiction. *Branson* conceded that "there are some circumstances in which attorney's fees or costs may be imposed even where the court proves to be without subject matter jurisdiction" (62 F.3d at 293 n.10, citing 28 U.S.C. §§ 1919 and 1447(c)) but did not attempt to distinguish those provisions from § 1988. The other two decisions have even less reasoning. Yet before *Thorne, Branson*, and *Keene*, this circuit had reached a contrary conclusion. See *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988). In *Charles* the Supreme Court concluded that a would-be appellant lacked standing, knocking out jurisdiction over an appeal. *Diamond v. Charles*, 476 U.S. 54 (1986). Then we ordered the party who had caused the unnecessary proceedings to pay the other side's costs and attorneys' fees under § 1988. *Thorne, Branson, Keene* and the district court all neglected *Charles* and its predecessors, including *Sanders v. CIR*, 813 F.2d 859 (7th Cir. 1987), and *Moten v. Bricklayers International*

Union, 543 F.2d 224 (D.C. Cir. 1976). *Sanders* concluded that because a court has jurisdiction to determine its own jurisdiction, the Tax Court may award attorneys' fees in a proceeding that it is not authorized to decide on the merits; *Moten* reached a similar conclusion under the fee-shifting provision in 42 U.S.C. § 2000e-5(k). Although the district court in *Charles* had jurisdiction, as the district court here did not, the award of fees dealt with proceedings on appeal, proceedings that were not properly initiated because the appellant lacked standing, and there was accordingly no case presented for decision on the merits. If an award of fees was within the court's jurisdiction in *Charles*, it is equally within the court's jurisdiction here. Nothing in *Thorne, Branson, Keene*, or the district court's opinion persuades us that *Charles* or *Sanders* should be limited or overruled.

The final appellate decision on which the district court relied does not support its decision. *Cliburn v. Police Jury Association of Louisiana, Inc.*, 165 F.3d 315 (5th Cir. 1999), held that the language of a particular fee-shifting provision, properly construed, does not authorize awards to defendants when the underlying suit is outside federal jurisdiction. The provision at issue reads:

> In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1). The fifth circuit concluded (165 F.3d at 316):

> The district court's dismissal of Cliburn's claims for lack of subject matter jurisdiction is inconsistent with an award of fees and costs under a statute which requires "any action under this subchapter." In dismissing Cliburn's suit, the district court determined that there was no ERISA "action." Furthermore, given that ERISA is inapplicable to Cliburn's claims, it is inconsistent to conclude that either Cliburn or the Police Jury Association is "a participant, beneficiary, or fiduciary" eligible to invoke § 1132(g)(1). Given that the district court lacked jurisdiction to hear Cliburn's claims under ERISA, it logically follows that the court lacked jurisdiction to entertain the Police Jury Association's request for fees, costs, and expenses under ERISA.

We have no quarrel with this conclusion, but it does not shed light on the application of 42 U.S.C. § 11046(f), which provides:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

Does this cover The Steel Company's request? CBE has not advanced an argument along Cliburn's lines that The Steel Company's motion for fees did not ask the district court for an award "in issuing any final order in any action brought pursuant to this section". CBE's action was "brought pursuant to" § 11046; it could not have been brought under any *other* law, and the suit's failure did not make it the less

one "brought pursuant to" § 11046. See *Steel Co.*, 523 U.S. at 92-93. CBE does, however, make two other statutory arguments against application of § 11046(f), the first of which focuses on the words "prevailing party". Has The Steel Company "prevailed" in this litigation?

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 792 (1989), concluded that a plaintiff prevails for purposes of 42 U.S.C. § 1988 only if "at a minimum . . . the plaintiff [can] point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Alternatively, the Court wrote, the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties" (489 U.S. at 792-93). We may assume that § 11046(f) uses "prevailing party" in the same way. If a plaintiff prevails by securing a change in legal relations, then a defendant prevails by securing an entitlement not to have any change in legal relations. If a plaintiff prevails by an award of damages or an injunction, the defendant prevails by securing a declaration that it need not pay damages or alter its behavior. Defeating a plaintiff on the merits is one way to obtain such assurance, but hardly the only way. A declaration that the plaintiff and others like it are not even entitled to sue accomplishes the same end, and more. The Steel Company could have "prevailed" by obtaining a declaration that it need not pay a penalty for this particular delay; instead it obtained from the Supreme Court much more--a decision foreclosing any private plaintiff from suing about this delay or any other. This is the most sweeping victory for which it could have hoped.

Sometimes victory on a jurisdictional point merely prolongs litigation. A defendant may persuade the court

that the plaintiff has sued too soon, or in the wrong court, or failed to jump through a procedural hoop. Then the dispute will continue later, or elsewhere, and it remains to be seen who will prevail. Such a victory is like persuading a judge to deny summary judgment, a step that transfers decision to a jury but does not end the litigation in defendant's favor and therefore does not make it a prevailing party. See *Hanrahan v. Hampton*, 446 U.S. 754 (1980); cf. *Shalala v. Schaefer*, 509 U.S. 292, 300-02 (1993). But the Supreme Court's decision in this case did not just put off the evil day for The Steel Company. It terminated this suit and barred all others like it, for as long as the statute retains its current language. It was a triumph in the war, not just in a battle or even a campaign.

The alternative of limiting "prevailing" to "prevailing on the merits" has nothing to recommend it under either the text of the statute or the considerations that lie behind fee-shifting statutes. Although this approach has found favor in some other circuits--see, e.g., *Figueroa v. Buccaneer Hotel Inc.*, 188 F.3d 172, 183 n.15 (3d Cir. 1999); *Keene*, 908 F.2d at 298; *Branson*, 62 F.3d at 293 (contra *Elks National Foundation v. Weber*, 942 F.2d 1480, 1485 (9th Cir. 1991)); *GHK Exploration Co. v. Tenneco Oil Co.*, 857 F.2d 1388, 1391 (10th Cir. 1988)--this court has long been of the view that success on a fundamental jurisdictional point can make a litigant a "prevailing party". *Charles* is again our leading case.

Plaintiffs who had successfully challenged the constitutionality of a state law sought to recover attorneys' fees under § 1988 not only from governmental defendants but also from three private intervenors. The district court directed two of the intervenors to reimburse plaintiffs for

attorneys' fees they had incurred as appellees before the Supreme Court. The Court dismissed an appeal initiated by those intervenors after concluding that they lacked standing. In holding that appellees were prevailing parties in the Supreme Court proceedings, our panel observed that such parties should not be forced to "absorb the costs of defending lawsuits the appealing party lacked proper standing to bring." 846 F.2d at 1073. We see no reason in principle why a defendant that gets everything it desires after three tiers of litigation ending in a proclamation of "no jurisdiction" should have less entitlement to prevailing-party status than did the equivalently-successful appellees in *Charles*, who used a jurisdictional shield to retain what they had won in the district court. *Moten*, which we have already mentioned, also holds that a litigant may become a prevailing party by securing a jurisdictional victory of sufficient scope. And of course since 1875 courts have awarded costs to litigants that prevail on jurisdictional grounds, and did so in this very case--though under Fed. R. Civ. P. 54(d)(1) only a "prevailing party" recovers costs. We hold that when a dismissal for want of jurisdiction forecloses the plaintiff's claim, the defendant is the "prevailing party."

So much for CBE's first statutory argument. Its second is that The Steel Company is not entitled to fees, even as a "prevailing party," because § 11046(f) should be read to incorporate the standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). According to *Christiansburg*, prevailing plaintiffs in civil-rights cases presumptively recover attorneys' fees, but an award should be made in favor of a prevailing defendant only if the suit was frivolous, unreasonable, or pursued in bad faith. CBE contends that the same standard should be used in environ-

mental statutes, including § 11046(f). The statute at issue in *Christiansburg*, 42 U.S.C. § 2000e-5(k), provides that a court may "in its discretion . . . allow the prevailing party . . . a reasonable attorney's fee"; *Christiansburg* prescribes how district judges must exercise that discretion. Because § 11046(f) also includes language conferring discretion on the judge (the "appropriate" phrase), CBE contends that discretion should be exercised with the same thumb on the scale in plaintiffs' favor. Borrowing from *Christiansburg* is far from inevitable. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), holds that another fee-shifting statute, one with language materially identical to § 2000e-5(k), must be applied to treat prevailing plaintiffs and prevailing defendants equally. *Fogerty* warns courts not to extend *Christiansburg* mechanically. See *Stomper v. Amalgamated Transit Union*, 27 F.3d 316 (7th Cir. 1994). But with respect to environmental laws the Court itself did this before *Fogerty*, and its approach controls here.

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 560 (1986), says that the fee-shifting provisions of environmental statutes that promote private enforcement should be applied "in the same manner" as § 1988, a statute covered by *Christiansburg*'s asymmetric approach. Although the issue in *Delaware Valley* was whether plaintiffs could recover for post-judgment expenses of monitoring compliance with a consent decree, the proposition that environmental fee-shifting laws should be governed by the same principles as fee-shifting under § 1988 formed the basis of the Court's disposition and therefore cannot be treated as dictum. The Steel Company has not identified any feature in the language or structure of § 11046(f) that distinguishes it from the statute in *Delaware Valley*. Indeed, in a follow-up decision, *Pennsylvania v.*

Delaware Valley Citizens' Council, 483 U.S. 711 (1987), the Court stated that its initial opinion had decided that "in awarding attorney's fees under § 304(d) [of the Clean Air Act] the courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988". 483 U.S. at 713 n. 1. A concurring opinion by Justice Thomas in *Fogerty*, 510 U.S. at 538, cited this passage as establishing that "we have construed similar attorney's fee provisions to impose a 'dual' standard of recovery". Until the Supreme Court suggests otherwise, this court must read "in the same manner" to mean just that. The Steel Company therefore is entitled to recover its legal expenses only if CBE's suit was frivolous, groundless, pursued in bad faith, or maintained after its baselessness became apparent.

Misconceived this suit was. Frivolous it was not. A panel of this court held that CBE was entitled to proceed. The Solicitor General supported that decision before the Supreme Court. A suit strong enough to survive an appeal cannot be deemed frivolous, even if all nine Justices thought it unavailing. We recognize that CBE did not win in this court; all it secured was the right to litigate on the merits. (The district court had dismissed its suit for want of jurisdiction.) No one suggests that CBE's claim was frivolous on the merits, however, for The Steel Company concededly filed reports after the statutory deadlines. That's why The Steel Company needed to pitch its defense on jurisdictional grounds. Thus although we do not agree with the district court's reasons, we agree with its judgment: The Steel Company's request for fees was properly denied.

One last matter. The parties have squabbled over the content of The Steel Company's brief, and a motions judge ordered that CBE's motion to strike passages be taken with

the case. The Steel Company depicts itself as a small and struggling manufacturer and asserts that CBE is a well-heeled environmental juggernaut, while CBE asserts that this is not supported by the record and that it is David to The Steel Company's Goliath. This dispute is irrelevant to our decision. We have no wish to encourage parties to answer emotional appeals with demands that we scrutinize those passages for details. If CBE feared that an exercise in statutory interpretation would be subverted by misconceptions about the parties' relative wealth, it was free to reply in its own brief without asking us to take a red pencil to its adversary's. *Day v. Northern Indiana Public Service Corp.*, 164 F.3d 382 (7th Cir. 1999). Better still, litigants should give the judges some credit for ability to resolve legal issues in compliance with the oaths all of us have taken to "administer justice without respect to persons, and do equal right to the poor and to the rich" (28 U.S.C. § 453). The motion to strike is denied.

AFFIRMED.

RIPPLE, *Circuit Judge*, concurring. This case presents two intertwined, yet independent, issues that we must address: 1) whether the district court had jurisdiction to award attorneys' fees to The Steel Company; and 2) whether The Steel Company was entitled to attorneys' fees as a "prevailing party" under the Emergency Planning and Right-To-Know Act, 42 U.S.C. §§ 11001-50. My colleagues present a thoughtful analysis of these two issues. We are not in disagreement with respect to the result or with respect to the basic analysis. I agree that the district court had jurisdiction to award attorneys' fees, that The Steel Company meets the requirements for a prevailing party under the Act, but that fees are not appropriate in the present action by virtue of the rule set forth in

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). I write separately simply to emphasize how our decision today squares with our earlier precedent.

In my view, our court's analysis in *Szabo Food Service v. Canteen Corporation*, 823 F.2d 1073 (7th Cir. 1987), is especially helpful in understanding the scope of today's holding and in distinguishing it from other recent cases. In *Szabo Food Service*, this court identified the different meanings of "lack of jurisdiction." The first category we identified was "the image of subject matter jurisdiction." We stated:

> If one citizen of Illinois files a suit based on state law against another citizen of Illinois, a federal court lacks jurisdiction over the subject matter; so too if a plaintiff files a specious civil rights suit, for an absurd complaint does not even invoke federal question jurisdiction. Yet a court has jurisdiction to determine its jurisdiction and therefore may engage in all the usual judicial acts, even though it has no power to decide the case on the merits. It may supervise discovery, hold a trial, and order the payment of costs at the end. If the complaint is indeed too silly to create subject matter jurisdiction, attorneys' fees should be an ordinary incident of the award of costs.

Id. at 1077-78 (citations omitted). The second sense of "lack of jurisdiction" was when a court "has lost [its] power to proceed, even though the case is within the federal judicial power." *Id.* at 1078. This second jurisdictional category most often comes into play when a court has entered a final judgment; in those circumstances, a court loses its ability to consider the merits of the action, but does

"not also lose power to award attorneys' fees that may be in order as a result of what happened before the final decision." *Id.* at 1078. Finally, we discussed "a third 'jurisdictional' analogy [that] rests on the case or controversy requirement of Article III." *Id.* "When the plaintiff packs up his portfolio and goes home," we stated, "the case goes home with him. . . . Courts occasionally sum up the effect of the missing plaintiff by stating . . . : 'It is as if the suit had never been brought.' A court could not award attorneys' fees in a case that had never begun . . . ." *Id.* (citations omitted).

Our case law since *Szabo Food Service* has adhered to these categories. For example, in *Board of Education v. Nathan R.*, 199 F.3d 377 (7th Cir.), *cert. denied*, 68 U.S.L.W. 3775 (Oct. 2, 2000), we held that we could not consider an award of fees against a school corporation for deprivation of special education services when the action had been mooted by the student's graduation from high school. In those circumstances, "[b]ecause we would need to consider the merits to determine whether the Parents are prevailing parties, we agree[d] that we [could] not decide whether the Parents would be entitled to attorneys' fees from the proceedings in the district court." *Id.* at 381. In essence, we determined that a mooted case most closely resembles the third *Szabo Food Service* category; because we no longer had a controversy to decide, we could not determine issues, such as attorneys' fees, that were dependent upon our having decided the underlying controversy. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990); *see also Rhodes v. Stewart*, 488 U.S. 1 (1988).

The situation in the present case is more closely akin to the first *Szabo Food Service* category. Here, there is no question that the district court, this court, and the Supreme Court, had the authority to receive briefs, to hear argument, and to consider the issue of whether there was federal jurisdiction to resolve the merits of the underlying controversy; the courts involved had jurisdiction to determine their jurisdiction. From the authority to determine its jurisdiction necessarily flows the power of the court to award attorneys' fees based on the actions properly before it. Consequently, the district court had the authority to award fees arising from the actions of the parties in the course of resolving the jurisdictional issue. As my colleagues point out, this court's decision in *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), points the way.

The question remains, however, whether attorneys' fees are available to The Steel Company. This inquiry requires that we decide whether it has prevailed for purposes of the Act. With respect to this issue, as my colleagues point out, the decision of the Supreme Court in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), is instructive. In that case the Court addressed the issue of when a plaintiff might be considered a "prevailing party" for purposes of 42 U.S.C. § 1988. The Court stated that "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92; *see also Hewitt v. Helms*, 482 U.S. 755 (1987). Here, CBE brought suit to collect fees from The Steel Company for failure to make required disclosures under the Act. The Steel Company, for its part, sought to prevent CBE from collecting those fees; one of the

bases upon which it defended the action was to challenge CBE's standing to bring the action. The Supreme Court agreed with The Steel Company that CBE lacked standing; its decision therefore foreclosed CBE's recovery of fees. In the words of the Supreme Court, The Steel Company prevailed on a "significant issue in litigation"--CBE's standing, which achieved for The Steel Company the only benefit that it could derive in defending the action. Consequently, The Steel Company is a prevailing party for purposes of the Act.

As my colleagues hold, however, our analysis does not end here. I agree with my colleagues that § 11046(f) incorporates the standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and that standard precludes The Steel Company from recovering in the present action.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITIZENS FOR A BETTER ENVIRONMENT,	)	
Plaintiff,	)	95 C 4534
v.	)	Judge George M. Marovich
THE STEEL COMPANY, aka CHICAGO STEEL AND PICKLING COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On March 4, 1998, the United States Supreme Court determined conclusively that the federal courts lacked jurisdiction over Plaintiff Citizens for a Better Environment's ("CBE") Complaint against Defendant The Steel Company ("TSC") which alleged certain violations of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(a)(1). TSC has now filed a motion for attorney's fees and non-taxable expenses against CBE pursuant to § 326(f) of EPCRA, 42 U.S.C. § 11046(f). In response, CBE asserts that this Court lacks jurisdiction to consider TSC's motion. This Court agrees

and, therefore, denies TSC's motion for attorney's fees and non-table expenses.[1]

BACKGROUND

In 1995, CBE, an association of individuals interested in environmental protection, sued TSC, a small manufacturing company, for past violations of EPCRA. This Court granted TSC's motion to dismiss CBE's Complaint for lack of subject matter jurisdiction, the Seventh Circuit reversed that determination and the United States Supreme Court subsequently agreed to review the matter. The Court ultimately held that CBE lacked standing to maintain the suit, and both the Supreme Court and lower courts therefore lacked jurisdiction to consider it. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 118 S. Ct. 1003, 1009-1021 (1998). The Seventh Circuit subsequently remanded the case back to this Court with instructions to dismiss CBE's Complaint, and CBE's Complaint has been dismissed.

TSC now moves for an award of $270,208.61 in attorney's fees and non-taxable expenses under EPCRA's fee-shifting provision. *See* 42 U.S.C. § 11046(f). That statute provides that "the court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness

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[1] CBE has additionally "moved to dismiss and strike" TSC's motion pursuant to Fed. R. Civ. P. 12(b)(1), 12(f) & 12(h)(3). TSC correctly notes that such a motion may only be directed at a "pleading" and, therefore, CBE's motion is procedurally astray. Nevertheless, the Court has considered CBE's jurisdictional argument in the context of TSC's motion.

fees) to the prevailing party or substantially prevailing party whenever the court determines such an award is appropriate." *Id.* In response, CBE contends that because this Court lacked subject matter jurisdiction to consider its original Complaint, the Court similarly lacks jurisdiction to consider TSC's motion for attorney's fees and non-taxable expenses.

DISCUSSION

Federal district courts are vested with federal question jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. As the Supreme Court recently reiterated in this case:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. . . . The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.

Steel Co., 118 S. Ct. at 1003 (quotations and citations omitted). Consequently, this Court must address the threshold matter of whether it has jurisdiction to consider TSC's motion for attorney's fees and non-taxable expenses. The Court finds that it does not.

Initially, the fact that EPCRA authorizes courts the discretion to award attorney's fees does not, by itself, constitute an independent grant of jurisdiction. Indeed, the

Supreme Court has noted in this very case that "[a]n 'interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'" *Id.* at 1019 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)). Although the Supreme Court addressed this matter in the context of whether *CBE*'s interest in attorney's fees could establish jurisdiction, the Court's reasoning is equally applicable to TSC. In short, TSC's purported interest in attorney's fees under EPCRA cannot create an Article III case or controversy because no such case or controversy exists over the merits of the EPCRA claim.[2]

TSC alternatively argues that this Court has jurisdiction to consider the issue of attorney's fees because it may address the issues "collateral" to the underlying dispute. In support of this proposition, TSC relies predominately on a series of cases in which the Supreme Court allowed the imposition of Rule 11 sanctions when the district courts lacked jurisdiction over the original complaint. *See Cooter & Gell v. Hartma[r]x Corp.*, 496 U.S. 384 (1990); *Willy v. Coastal Corp.*, 503 U.S. 131 (1992).

TSC's reliance on the Supreme Court's Rule 11 jurisprudence is misplaced. In *Willy*, the Court noted that the

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[2] This conclusion is consistent with courts which have held that they lacked jurisdiction to entertain motions for attorney's fees under fee-shifting provisions contained in other statutes where the court lacked subject matter jurisdiction over the underlying substantive claim. *See, e.g., Cliburn v. Policy Jury Assoc. of Louisiana,* 165 F.3d 315, 316 (5th Cir. 1999) (ERISA); *W.G. v. Senatore,* 18 F.3d 60, 64 (2d Cir. 1994) (Individuals with Disabilities Education Act); *Keene Corp. v. Cass,* 908 F.2d 293, 298 (8th Cir. 1990) (§ 1988); *Branson v. Nott,* 62 F.3d 287, 292 (9th Cir. 1994) (same).

decision to grant Rule 11 sanctions is wholly unrelated to a judgment on the merits but is instead concerned with the orderly procedure of the court. As such, a court's authority to award attorney's fees or sanctions under Rule 11 is drawn not from the Constitution's Article III jurisdictional requirements, but rather congressional authority under Article I, § 8, cl. 9 to establish laws regulating the conduct of the courts. *Willy,* 503 U.S. at 136. The imposition of Rule 11 sanctions therefore is a procedural matter that is not restricted by Article III standing requirements. Here, the procedural concerns regarding abuse of the judicial system present in both *Willy* and *Cooter & Gell* are notably absent. As such, the Supreme Court's Rule 11 jurisprudence is not germane.[3]

The additional cases which TSC cites in support of its argument for "collateral" matter jurisdiction are equally inapposite. Pivotally, in each of the cases cited by TSC, the court had original jurisdiction over the proceedings at some point and retained jurisdiction to consider collateral matters

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[3] Parenthetically, TSC argues that although both *Willy* and *Cooter & Gell* dealt with Rule 11 sanctions, the Court's reasoning in those cases was not restricted to Rule 11 situations. In particular, TSC argues that the Court in *Cooter & Gell* relied on cases that "had nothing whatsoever to do with Rule 11." (*See* Def. Supp. Resp. at 4, citing *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161 (1939); *White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445 (1982); and *Bray v. United States,* 423 U.S. 73 (1975)). TSC, however, has failed to explain how the cases *Willy* and *Cooter & Gell* relied on have anything whatsoever to do with this case. In short, nothing in those cases or this Court's reading of *Willy* and *Cooter & Gell* suggests that the Supreme Court intended to extend its jurisdictional holding beyond the context of Rule 11 and, therefore, this Court declines TSC's invitation to expand the Supreme Court's holdings in those cases.

after its jurisdiction was divested. *See, e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (district court retained jurisdiction to consider attorney's fees issue after timely notice of appeal); *United States v. Kusay*, 62 F.3d 192, 193-94 (7th Cir. 1995) (same); *Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist.*, 71 F.3d 1053 (2d Cir. 1995) (district court retained jurisdiction to consider attorney's fees issue after settlement); *Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252, 256-57 (6th Cir. 1997) (district court retained jurisdiction to consider attorney's fees issue under 28 U.S.C. § 1447(c) after remand). Unlike the above cases, this Court has never had jurisdiction over this dispute and, therefore, it cannot exercise jurisdiction "collaterally" now.

CONCLUSION

As explained above, this Court lacks jurisdiction to consider The Steel Company's motion for attorney's fees and non-taxable expenses. The Steel Company's motion is therefore denied. Citizens for a Better Environment's motion to dismiss and to strike is denied as moot.

ENTER:

GEORGE M. MAROVICH
UNITED STATES DISTRICT COURT

DATED: June 8, 1999

APPENDIX C

42 U.S.C. § 11046. Civil Actions

(a) Authority to bring civil actions. (1) Citizen suits. Except as provided in subsection (e), any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

(i) Submit a followup emergency notice under section 304(c) [42 U.S.C. § 11004(c)].

(ii) Submit a material safety data sheet or a list under section 311(a) [42 U.S.C. § 11021(a)].

(iii) Complete and submit an inventory form under section 312(a) [42 U.S.C. § 11022(a)] containing tier I information as described in section 312(d)(1) [42 U.S.C. § 11022(d)(1)] unless such requirement does not apply by reason of the second sentence of section 312(a)(2) [42 U.S.C. § 11022(a)(2)].

(iv) Complete and submit a toxic chemical release form under § 313(a) [42 U.S.C. § 11023(a)].

(B) The Administrator for failure to do any of the following:

(i) Publish inventory forms under section 312(g) [42 U.S.C. § 11022(g)].

(ii) Respond to a petition to add or delete a chemical under section 313(e)(1) [42 U.S.C. § 11023(e)(1)] within 180 days after receipt of the petition.

(iii) Publish a toxic chemical release form under section 313(g) [42 U.S.C. § 11023(g)].

(iv) Establish a computer database in accordance

with section 313(j) [42 U.S.C. § 11023(j)].

(v) Promulgate trade secret regulations under section 322(c) [42 U.S.C. § 11042(c)].

(vi) Render a decision in response to a petition under section 322(d) [42 U.S.C. § 11042(d)] within 9 months after receipt of the petition.

(C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 324(a) [42 U.S.C. § 11044(a)].

(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 312(e)(3) [42 U.S.C. § 11022(e)(3)] within 120 days after the date of receipt of the request.

(2) State or local suits. (A) Any State or local government may commence a civil action against an owner or operator of a facility for failure to do any of the following:

(i) Provide notification to the emergency response commission in the State under section 302(c) [42 U.S.C. § 11002(c)].

(ii) Submit a material safety data sheet or a list under section 311(a) [42 U.S.C. § 11021(a)].

(iii) Make available information requested under section 311(c) [42 U.S.C. § 11021(c)].

(iv) Complete and submit an inventory form under section 312(a) [42 U.S.C. § 11022(a)] containing tier I information unless such requirement does not apply by reason of the second sentence of section 312(a)(2) [42 U.S.C. § 11022(a)(2)].

(B) Any State emergency response commission or local emergency planning committee may

commence a civil action against an owner or operator of a facility for failure to provide information under section 303(d) [42 U.S.C. § 11003(d)] or for the failure to submit tier II information under section 312(e)(1) [42 U.S.C. § 11022].

(C) Any State may commence a civil action against the Administrator for failure to provide information to the State under section 322(g) [42 U.S.C. § 11042(g)].

(b) Venue. (1) Any action under subsection (a) against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

(2) Any action under subsection (a) against the Administrator may be brought in the United States District Court for the District of Columbia.

(c) Relief. The district court shall have jurisdiction in actions brought under subsection (a) against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement. The district court shall have jurisdiction in action brought under subsection (a) against the Administrator to order the Administrator to perform the act or duty concerned.

(d) Notice. (1) No action may be commenced under subsection (a)(1)(A) prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(2) No action may be commenced under subsection (a)(1)(B) or (a)(1)(C) prior to 60 days after the date on

which the plaintiff gives notice to the Administrator, State Governor, or State emergency response commission (as the case may be) that the plaintiff will commence the action. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(e) Limitation. No action may be commenced under subsection (a) against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act [42 U.S.C. §§ 11001 et seq.] with respect to the violation of the requirement.

(f) Costs. The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) Other Rights. Nothing in this section shall restrict or expand any rights which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator or a State agency).

(h) Intervention. (1) By the United States. In any action under this section the United States or the State, or both, if not a party, may intervene as a matter of right.

(2) By persons. In any action under this section, any person may intervene as a matter of right when such person has a direct interest which is or may be directly affected by the action and the disposition of the action may, as a

practical matter, impair or impede the person's ability to protect that interest unless the Administrator or the State shows that the person's interest is adequately represented by existing parties in the action.

Supreme Court, U.S.
FILED
FEB 15 2001
OFFICE OF THE CLERK

(2)

No. 00-1146

In the
Supreme Court of the United States

THE STEEL COMPANY, AKA CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND STATE OF CALIFORNIA AUTO DISMANTLERS ASSOCIATION IN SUPPORT OF PETITIONER

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae

25pp

QUESTION PRESENTED

Whether prevailing defendants should be placed on an equal footing with prevailing plaintiffs in determining whether an award of attorney fees is "appropriate" under the fee-shifting provision of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. § 11046(f), and similarly worded fee-shifting provisions of other federal environmental statutes.

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I

IDENTITY AND INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation and the State of California Auto Dismantlers Association respectfully submit this brief amicus curiae in support of Petitioner, The Steel Company.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is supported by thousands of citizens from coast to coast and is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide in state and federal courts and is directly affected by fee-shifting statutes.

In its fight to protect fundamental rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF has a long-standing interest in environmental issues and has participated in this Court in numerous cases involving the interpretation of federal environmental laws.

The State of California Auto Dismantlers Association (Association) is a nonprofit organization with approximately 500 members and represents the interests of the 1,400 licensed auto dismantlers in the State of California. Licensed facilities

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part and that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

are the only entities authorized to dismantle and salvage vehicles for the recovery and recycling of parts and metals and for properly disposing of the 300 pounds of toxins and hazardous materials in the typical vehicle.

In addition to its lobbying efforts, the Association provides services and training. Business and regulatory information is provided by the Association at conferences and through various publications. For example, the Association has put together an industry guide for complying with the storm water regulations under the Clean Water Act. For several years, the industry has worked hard to ensure compliance with the many environmental regulations that govern these licensed facilities. The industry's compliance with the state's general storm water permit is well documented.

However, these largely family owned businesses have recently been targeted by environmental activists with threats of litigation for supposed infractions under the Clean Water Act. These activists have sent California auto dismantlers scores of notices of intent to sue. These notices have cost the industry huge sums in legal fees and cash settlements.

The notices of intent to sue inform industry members that they are allegedly in violation of the Clean Water Act and have 60 days to comply. Such notices typically result in settlements with the environmental group for approximately $50,000 and few, if any, onsite environmental issues are addressed. The mere threat of taking a small business to federal court compels the business owner in most cases to seek a monetary settlement with the potential plaintiff.

The allegations in these notices are often vague to the point of unintelligibility. "Evidence" of failure to comply typically entails a mere picture of a puddle in the facility parking lot with an oil sheen on the top. Allegations of harm include claims that there "may be" fewer birds in the area of the facility than elsewhere and that boaters (miles away from the

inland facility) have gotten oil on their hands while untangling a propeller on their boat. The notices usually make no attempt to connect the alleged violations to the alleged harms. And while many of these cases could never prevail in court, the cost to defend against such accusations (without even the hope of a fee award) is more than the industry or a small family owned business can support. In some cases, these notices have resulted in the virtual confiscation of the business and even the personal assets of some individuals.

Therefore, the Association has a direct interest in this case that puts at issue the treatment of prevailing defendants under the fee-shifting provisions of environmental statutes. The Association, along with PLF's public policy perspective, will provide a necessary viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The Steel Company is a small, minority-owned steel manufacturer and pickler in Chicago, Illinois. The Company started in 1971 and employs about 55 people. The Company is subject to the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) (42 U.S.C. § 11001, *et seq.*) that requires, among other things, the annual submission of chemical inventory and release forms to federal, state, and local entities.

In 1995, Citizens for a Better Environment (CBE), a large environmental citizen group, sent an EPCRA 60-day Notice of Intent to Sue to the United States Environmental Protection Agency (EPA), the state, and the Company alleging the Company had never filed the requisite forms. Before the 60-day notice period had run, the Company filed the forms with the EPA. EPA chose not to pursue any enforcement action but, notwithstanding the Company's remedial filing, CBE brought suit in the Northern District Court of Illinois seeking, among other things, civil penalties against the Company in excess of

$537,000,000. The district court dismissed the case but the Seventh Circuit reversed.

On certiorari, this Court held there was no ongoing dispute and, therefore, CBE lacked constitutional (Article III) standing to bring the suit. This was a watershed case in citizen-suit standing and was decided by a unanimous court.

On remand, The Steel Company sought attorneys' fees as a "prevailing party" in the amount of $270,000. EPCRA authorizes such fees:

> The Court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing party or the substantially prevailing party whenever the court determines such an award is appropriate.

42 U.S.C. § 11046(f).

Although this provision is party-neutral on its face, the Seventh Circuit applied a "double standard" ruling that while prevailing plaintiffs are presumptively entitled to attorney's fees, prevailing defendants must show the suit was "frivolous, unreasonable, or pursued in bad faith." Since the suit was deemed ill-advised but not frivolous, The Steel Company was denied fees.

The Steel Company has petitioned this Court to determine whether the fee-shifting provision of EPCRA, like that of approximately 40 other similar environmental statutes, requires equal treatment of prevailing defendants.

SUMMARY OF THE ARGUMENT

This Court has twice characterized the question of fee awards for prevailing defendants as an important question of federal law warranting review by this Court. Under the Civil Rights Act, this Court determined that Congress intended to

protect impecunious plaintiffs from large businesses and that the fee-award provision of that statute should be interpreted to favor plaintiffs. However, using an ad hoc analysis, this Court considered a "virtually identical" provision in the Copyright Act and determined that Congress intended to protect defendants as well as plaintiffs and that the Act required even-handed treatment of successful parties. But this Court has never determined whether a similar fee-shifting provision in the Emergency Planning and Community Right-To-Know Act, or any other environmental statute, must be interpreted to require a "dual" or even-handed approach to fee awards.

The lower court's reliance on *Pennsylvania v. Delaware Valley Citizens' Council*, for the position that this Court requires application of the "dual standard" of fee awards in environmental cases, is misplaced. That case did not raise the question of fee awards for prevailing defendants, but turned on whether prevailing plaintiffs were entitled to fees for administrative actions.

In *Fogerty v. Fantasy, Inc.*, this Court made clear that the meaning given a fee-shifting provision in a statute will be determined by a case-by-case analysis of the goals and objectives of the act. Unlike the Civil Rights Act, that this Court believed was designed to maximize private suits, EPCRA and similar environmental statutes were designed to encourage compliance and avoid litigation. Environmental plaintiffs are not "private attorneys general" in the make of a civil rights plaintiff. Rather, they serve only to supplement, and not replace, governmental enforcement.

Environmental plaintiffs are also not generally impecunious but run the gamut from corporate behemoths to those of small means. Environmental suits are often brought by well funded activists, like CBE in this case, against small, family owned businesses such as amici auto dismantlers who can ill afford to defend themselves in court. Because these

defendants may not even recoup the cost of successful litigation, under the lower courts' "dual standard" for environmental suits, they must either settle the case at great expense or close down their business. This standard promotes opportunistic litigation for economic gain but deters litigation of a meritorious defense.

Neither the language of EPCRA nor the legislative history hint that successful plaintiffs are to be treated differently than successful defendants. Therefore, this Court should grant the Writ of Certiorari to address this important question of federal law.

ARGUMENT

I

WHETHER A PREVAILING DEFENDANT MAY RECEIVE AN AWARD OF ATTORNEY'S FEES UNDER AN ENVIRONMENTAL STATUTE IS AN IMPORTANT QUESTION OF FEDERAL LAW

On two occasions, this Court addressed the question of whether attorney's fees should be allowed when the defendant is the prevailing party. In one case, the Court considered the question in the context of a civil rights suit; and, in the other, the Court considered the question in the context of a copyright infringement suit. In both instances, certiorari was expressly granted so that this Court could address "an important question of federal law." The question arises now in the context of an environmental suit and is no less important.

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), was a Title VII action. In 1972, Congress amended Title VII of the Civil Rights Act of 1964 authorizing the Equal Employment Opportunity Commission (EEOC) to sue in its own name on "charges pending with the Commission" on the effective date of the amendments. Relying on charges of racial discrimination filed

years earlier by Rosa Helm against her employer, Christiansburg Garment Company, the EEOC sued the company for unlawful employment practices. The company defended on grounds that the charges were not "pending" at the time the 1972 amendments took effect. The district court agreed and granted summary judgment for the company.

The company then petitioned for attorney's fees as a prevailing defendant under section 706(k) of Title VII. That section stated:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k).

Notwithstanding the party-neutral language of this provision, the district court ruled the company was not entitled to an award of attorney's fees because the EEOC's action in bringing the suit could not be "characterized as unreasonable or meritless." *Christenburg,* 434 U.S. at 415. A divided Fourth Circuit affirmed, and this Court "*granted certiorari to consider an important question of federal law.*" *Id.*

On certiorari, this Court adopted a "dual standard" for awarding attorney's fees in Title VII cases. That standard requires a district court to grant an award of attorney's fees to a prevailing plaintiff "in all but special circumstances" while denying attorney's fees to a prevailing defendant except upon a finding the action was "frivolous, unreasonable, or without foundation." *Id.* at 417-21.

Although this Court admonished against a "mechanical construction" of such provisions, and the Court found a unique set of "equitable considerations" to justify its new Title VII

fee-award standard, *id.* at 419, the Court's "dual standard" for civil rights cases became the de facto standard in some circuits for interpreting all similarly worded fee-shifting provisions. This became apparent in a subsequent case this Court considered called *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

In that case, Fogerty successfully defended a copyright infringement action brought against him by Fantasy, Inc., and filed for an award of attorney's fees as a prevailing defendant. The fee-shifting provision of the Copyright Act of 1976 was "virtually identical," *id.* at 522, to that found in Title VII.

Following this Court's ruling in *Christiansburg*, the district and appellate courts ruled Fogerty was not entitled to attorney's fees as a prevailing defendant in a copyright action. But this Court granted certiorari to once again "*address an important area of federal law,*" and reversed. 510 U.S. at 521.

It is clear from *Fogerty* that this Court has adopted an ad hoc approach to determining the appropriateness of a fee award for a prevailing defendant. In *Fogerty*, this Court went to great lengths to compare and contrast the Copyright and Civil Rights Acts and concluded the goals and objectives of the two Acts are not similar. *Id.* at 524. Most importantly, this Court concluded that "the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement"—a feature of Title VII that this Court found decisive in *Christiansburg*. Consequently, this Court rejected the "dual standard" approach of *Christiansburg* in a copyright context and adopted an evenhanded approach; holding that "[p]revailing plaintiffs and prevailing defendants are to be treated alike" under the Copyright Act.

But in stark contrast to the thorough analysis this Court employed in *Fogerty* to determine the "goals and objectives" of the Copyright Act and, therefore, the propriety of a fee award

for prevailing defendants, the Seventh Circuit in this case adhered to the *Christiansburg* "dual standard" as a per se rule and summarily rejected The Steel Company's claim for $270,000 in attorney's fees. *See Citizens for a Better Environment v. The Steel Company*, 230 F.3d 923, 931 (7th Cir. 2000).

It is necessary, therefore, that this Court determine if the "goals and objectives" of the Emergency Planning and Community Right-To-Know Act, an environmental statute, are more like the Civil Rights Act of 1964, as interpreted by this Court in *Christiansburg*, or the Copyright Act of 1976, as interpreted by this Court in *Fogerty*.

II

CERTIORARI SHOULD BE GRANTED TO CLARIFY THIS COURT'S DECISION IN *PENNSYLVANIA v. DELAWARE VALLEY CITIZENS' COUNCIL* ON WHICH THE LOWER COURTS ERRONEOUSLY RELY TO DENY ATTORNEY'S FEES TO PREVAILING DEFENDANTS

The court below applied the "dual standard" for fee awards in this EPCRA case because it felt compelled by this Court's putative application of *Christiansburg* in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986). But, that case provides no precedent for this case.

In *Pennsylvania*, the plaintiff, Delaware Valley Citizens' Council, sued the commonwealth for failure to implement a vehicle inspection and maintenance (I/M) program required by the Clean Air Act. Pursuant to a consent decree, Pennsylvania agreed to implement an I/M program in some counties. As a prevailing party under section 304(d) of the Act, the plaintiff sought and received fees and costs; not only for the cost of litigation, but also for monitoring Pennsylvania's performance under the consent decree and subsequent participation in related

rulemaking proceedings. Pennsylvania challenged the award of fees and costs related to plaintiff's administrative actions arguing the Act only authorized fee awards for the "costs of litigation." 478 U.S. at 557-58.

The primary question before this Court, therefore, and unlike the question in this case, was "whether the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, authorizes attorney's fees awards [for prevailing plaintiffs] for time spent by counsel participating in regulatory proceedings." *Id.* at 548.

To address that question, this Court analogized to section 1988 jurisprudence:

> Several courts have held that, in the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, postjudgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee .... Although § 1988 authorizes fees in "any action or proceeding" brought to enforce the Civil Rights Acts, and § 304(d) applies only to "any action" brought under the Clean Air Act, this distinction is not a sufficient indication Congress intended § 304(d) to apply only to judicial, and not administrative, proceedings.

Id. at 559 (citations omitted).

Therefore, in determining the propriety of a fee award for a prevailing plaintiff for work in post-litigation administrative proceedings, this Court stated that "we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Id.* at 560. This Court did not address, however, the propriety of a fee award under the Clean Air Act, or any other statute, for a prevailing defendant. Nor did this Court imply that it had adopted the § 1988 "dual standard" as a general rule of applicability with respect to fee awards.

Nevertheless, the court below in the present case elevated this narrow opinion to a general and conclusive rule of law, encompassing all fee award questions arising under environmental, and presumably many other, fee-shifting statutes:

> *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 560, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986), says that the fee-shifting provisions of environmental statutes that promote private enforcement should be applied "in the same manner" as § 1988, a statute covered by *Christiansburg's* asymmetric [dual standard fee award] approach.

Citizens for a Better Environment v. The Steel Company, 230 F.3d at 931.

Of course, this Court has made no such general pronouncement. Had it done so, it could not have come to an opposite conclusion later in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, wherein this Court determined that the fee-shifting provision in that case—which is "virtually identical" to the fee-shifting provision in *Christiansburg*, as well as in this case and most other environmental statutes—does not allow the "asymmetric" treatment of prevailing defendants the lower court maintains is now required by this Court under *Pennsylvania* and *Christiansburg*.

As Justice Thomas suggested in his concurring opinion in *Fogerty*, to the extent *Pennsylvania* and *Christiansburg* are read to "impose a 'dual' standard of recovery," they create a conflict with *Fogerty* and constitute a "dubious precedent." He warns against doing what the Seventh Circuit has done in this case in expanding the precedent "to its outer limits." *Fogerty*, 510 U.S. at 538-39.

According to Justice Thomas, the standard for interpretation "implicit in *Christiansburg*," and more express in

Fogerty, is to look at the "policy objectives and legislative history of the statute." It is apparent, therefore, that this Court has rejected a categorical interpretation of the various fee-shifting statutes in favor of a case-by-case analysis based on the goals and objectives of the particular act. But this Court has never considered the goals and objectives of EPCRA, or any other environmental statute, to determine whether that statute allows a fee award for a prevailing defendant. Nevertheless, the Seventh Circuit precedent of this case is likely to be applied by other courts in interpreting EPCRA, and similar environmental laws, without a Supreme Court pronouncement. Therefore, this Court should address the issue now.

It is noteworthy that this Court recently granted certiorari in a similar context to address the viability of the so-called "catalyst theory" of fee awards. Under that theory a plaintiff may obtain a fee award as a "prevailing party" by merely inducing a favorable change in behavior in the defendant without any ruling on the merits of the claim or an enforceable order. This theory was created by the lower courts and has not been squarely addressed by this Court. However, in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources* (on writ of certiorari, No. 99-1848), the Fourth Circuit ruled that this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), precluded application of the theory.

Much like the Seventh Circuit's interpretation of *Pennsylvania* in this case, the Fourth Circuit in *Buckhannon* distilled a general rule from *Farrar* relating to the viability of the "catalyst theory," although this Court never addressed that theory in the *Farrar* case. This Court recently took the case up on review to clarify its decision in *Farrar* and to address an important question of federal law that requires a direct ruling by this Court. Likewise, this Court should grant review in this case to clarify its decision in *Pennsylvania* and to provide a direct ruling on whether EPCRA authorizes a fee award for a

prevailing defendant on an equal footing with a prevailing plaintiff—an important question of federal law.

III

IT IS IMPORTANT FOR THIS COURT TO CLARIFY THAT THE "GOALS AND OBJECTIVES" OF EPCRA SUPPORT AN AWARD OF ATTORNEY'S FEES FOR A PREVAILING DEFENDANT

The legislative policies behind EPCRA, and similar laws, suggest Congress intended an even-handed approach to fee awards in environmental suits. The citizen suit provisions of these statutes were designed to encourage compliance and deter, not promote, litigation. To ensure that the citizen suit provisions of federal environmental laws remain focused on achieving the purposes of these statutes, it is important for this Court to address the question of fee awards in this case.

In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, this Court ruled that the purposes of the Copyright Act, unlike the Civil Rights Act in *Christiansburg*, required equal treatment of prevailing plaintiffs and defendants, although the fee-award provisions in both Acts were "virtually identical." In his concurrence, Justice Thomas noted:

> The Court recognizes the general principle that similar fee provisions are to be interpreted alike . . . but states that the principle does not govern this case because the factors that guided our interpretation in Christiansburg—the policy objectives and legislative history of the statute —do not support the adoption of a "dual" standard in this context.

510 U.S. at 537 (citation omitted).

Justice Thomas clearly disagreed with this approach. He urged the Court to rely on the plain meaning of the fee-shifting provisions and "acknowledge that *Christiansburg* mistakenly

cast aside the statutory language to give effect to [other] considerations." *Id.* at 538. Nevertheless, Justice Thomas recognized that the Court's analytical approach "implicit in *Christiansburg*"—whether to interpret a fee-shifting statute "in accordance with its plain meaning"—depends on the statute's policy objectives and legislative history. *Id.* at 537-38.

The considerations this Court found in *Christiansburg,* to justify ignoring the plain language of the statute and to disallow an award of attorney's fees for a prevailing defendant, were two-fold. First, this Court found that a Title VII plaintiff is the "chosen instrument" of Congress to vindicate the goals of the Act. *Christianburg*, 510 U.S. at 523. And second, this Court relied on the admittedly sparse legislative history for its conclusion that successful plaintiffs should be treated differently than successful defendants. *Id.*

But in *Fogerty*, this Court found no such considerations:

> The goals and objectives of the two Acts are . . . not completely similar. Oftentimes, in the civil rights context, impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees. The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public . . . . In the copyright context, it has been noted that "entities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists; the same is true for prospective copyright infringement defendants."

Id. at 524 (citation omitted).

The disparity in the goals and objectives between EPCRA and the Civil Rights Act are just as great. Environmental plaintiffs are not Congress' "chosen instruments" to vindicate the goals of the Act nor are they impecunious parties who can "ill afford to litigate their claims against defendants with more resources." To the contrary, the state and federal governments are the "chosen instruments" of Congress to enforce this and similar environmental laws, and it is often the plaintiffs, not the defendants, who have the greater resources. As in the copyright context, both plaintiffs and defendants run the gamut from corporate behemoths to those who barely make ends meet.

A. Private Plaintiffs Are Not Congress' "Chosen Instruments" to Enforce EPCRA

In crafting the citizen suit provision of environmental laws, Congress sought to "strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *See Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (analyzing the legislative history of the citizen suit provision of the Clean Air Amendments of 1970, which served as the precursor to analogous citizen suit provisions in other environmental laws, including the Clean Water Act, the Resource Conservation and Recovery Act, and the Emergency Planning and Community Right-to-Know Act at issue in this case).

In furtherance of this goal, environmental plaintiffs are required to give 60-day notice of their intent to sue to the alleged violator and the federal and state governments. This Court stated in *Hallstrom*:

> Requiring citizens to comply with the [60-day] notice and delay requirements serves this congressional goal [of striking a balance] in two

> ways. First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits . . . . Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit."

Hallstrom, 493 U.S. at 29 (citing in part *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987)).

In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act (CWA), which is strikingly similar to the citizen suit provision in EPCRA, authorized citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction citing, among other things, the purpose of the citizen suit provision.

This Court reasoned that retroactive citizen suits would render incomprehensible the notice provision that requires citizens to give 60-day's notice of their intent to sue to the alleged violator as well as to the administrator of the EPA and the state. *Gwaltney*, 484 U.S. at 59. "If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Id.* According to this Court, it follows logically that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and, thus, likewise render unnecessary a citizen suit." *Id.* at 60. In a unanimous opinion, this Court stated: "If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Id.*

This Court also pointed out that the bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant

government action. *Id.* "Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit." *Id.* To illustrate this danger, this Court posed a hypothetical.

Suppose the administrator of the EPA identified a violator and issued a compliance order. *Id.* "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil penalties the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

This Court concluded that to allow citizen suits for past violations would subvert the purpose of the Act and change the nature of the citizen's role from interstitial to potentially intrusive. *Id.* The Court stated: "We cannot agree that Congress intended such a result." *Id.*

This Court's rationale for limiting the scope of the citizen suit provision of the Clean Water Act applies equally to EPCRA which contains a nearly identical prohibition on citizen suits when the government acts. Therefore, unlike the "private attorneys general" in the Civil Rights Act, environmental plaintiffs are not Congress' "chosen instrument" for enforcing EPCRA. To the contrary, they are, at most, merely supplemental. The paramount objective of citizen suits under federal environmental statutes is to encourage compliance and assist, not replace, governmental law enforcement. That is the theme pervading this Court's ruling in *Gwaltney*.

The most logical reason for Congress to have included party-neutral fee award language in EPCRA, and other environmental laws, is not only to provide an incentive for citizens to

pursue meritorious claims but also to encourage defendants to litigate meritorious defenses. *See* Petition for Writ of Certiorari at 7.

The policies served by EPCRA are "more complex, more measured, than simply maximizing the number of meritorious suits" for environmental reporting violations. *Fogerty*, 510 U.S. at 526. As this Court recognized in *Fogerty*, statutes often have more than one goal and "a successful defense . . . may further the policies of the . . . Act every bit as much as a successful prosecution." 510 U.S. at 527.

This is particularly true in this case where The Steel Company's vigorous defense resulted in a landmark ruling decided by a unanimous Supreme Court. The statutory language and legislative history "give no hint that successful plaintiffs are to be treated differently than successful defendants." *Id.* at 522. Therefore, this Court should grant certiorari to elucidate the fee award provision of EPCRA.

B. The Plaintiffs in This Case, as in Many Environmental Suits, Are Well Financed and Do Not Warrant Special Protection or Incentives in the Way of Fee Awards

Unlike the impecunious plaintiffs this Court determined Congress sought to protect under the Civil Rights Act, which warranted special treatment in fee awards, the plaintiffs in environmental actions are often well-financed, while the defendant may be a party with few resources.

Certainly the plaintiff in this case is not impecunious. Citizens for a Better Environment boasts a membership reaching into the tens of thousands. According to its IRS (Form 990) filing for fiscal year 1999, plaintiff had revenues in excess of $2,000,000. This is typical of the activists groups filing environmental suits around the country. IRS filings for fiscal year 1999 show Defenders of Wildlife with revenues in excess of $19,000,000, and more than $14,000,000 in net assets.

Likewise, the Sierra Club Foundation had revenues over $26,000,000, and net assets over $41,000,000; the Natural Resources Defense Council had revenues over $36,000,000, and net assets over $53,000,000; and, the World Wildlife Fund had revenues over $111,000,000, and net assets over $133,000,000.

Environmentalism is "Big Business" and environmental litigation is a large and lucrative industry. Suits are often brought by large organizations against small, family owned businesses like amici auto dismantlers (for minor administrative infractions) who cannot afford to defend themselves in court. *See* Identity and Interests of Amici Curiae above. Even if these defendants win their case, under the "dual standard" for fee awards they will not be able to recoup even the cost of litigation. Instead, they are forced to settle the suit at great expense or, in the worst cases, to give up their business rather than pursue a meritorious defense.

The range of both plaintiffs and defendants under EPCRA, like the Copyright Act, runs the gamut from corporate behemoths to cash-strapped individuals. But because of the favorable fee-award treatment environmental plaintiffs receive in the courts, they have little to lose and much to gain by filing unnecessary actions; actions like the present where the violation was technical and caused no harm to the environment. This encourages opportunistic litigation for economic gain. Environmental plaintiffs can and do use the threat of a lawsuit to coerce lucrative settlements from alleged violators. CBE readily admits that those companies that don't settle will be "punished" with a lawsuit.

> In the event that CBE is unable to settle the matter, it files court actions seeking penalties to be paid to the United States Treasury to *punish* non-complying companies and other companies from ignoring EPCRA.

Opening Brief for Plaintiff-Appellant, Citizens for a Better Environment, in the United States Court of Appeals for the Seventh Circuit at 9-10 (original suit) (emphasis added).

But, as noted above, the paramount objective of citizen suits under EPCRA is to encourage compliance. Congress could not have intended this law to be used by private citizens for their own punitive and mercenary purposes.

It is critical that this Court clarify this important area of federal law and level the playing field. With an even-handed fee award standard, plaintiffs will be less likely to pursue unnecessary cases while defendants, sometimes impecunious defendants, are afforded an incentive to litigate meritorious defenses.

CONCLUSION

This Court has never determined whether the fee-shifting provision of EPCRA, or any other environmental statute, requires disparate or even-handed treatment of successful defendants. This is an important question of law warranting a Writ of Certiorari. Review should be granted.

DATED: February, 2001.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae

(3)

Supreme Court, U.S.
FILED
MAR 15 2001
CLERK

No. 00-1146

In the

Supreme Court of the United States

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE OF THE CHEMICAL INDUSTRIES COUNCIL OF ILLINOIS, THE MID-AMERICA LEGAL FOUNDATION, AND THE ILLINOIS MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

JAMES T. HARRINGTON
Counsel of Record
WILLIAM A. PRICE, *General Counsel*
Mid-America Legal Foundation
201 East Loop Road
Wheaton, Illinois 60187
(630) 682-6042

Attorneys for Amici Curiae

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2, The Chemical Industries Council of Illinois, Illinois Manufacturers Association, and Mid-America Legal Foundation respectfully submit this brief as amici curiae in support of the Petitioner. The members of the amici Illinois Manufacturers Association and Chemical Industry Council of Illinois are typically subject to the environmental reporting requirements which were at issue in the first *Steel Company* case, and could be subject to the same types of attorneys fees and other costs if sued for purely past violations by parties who, like the Citizens for a Better Environment, lack standing to bring matters before the federal courts. Written consent to this appearance was granted by counsel for all parties.

The Mid-America Legal Foundation and the Illinois Manufacturers Association were permitted to address this Court as *amici curiae* in the Court's consideration of the original *Steel Company* case. The Chemical Industries Council of Illinois did not participate in that case, but has a membership with similar interests to those of MALF and IMA. Their members would be as significantly affected by an adverse result in this attorney's fees matter as they would have been by a decision other than that which the Court reached on standing. The business communities they represent largely consists of small business organizations, and their background and general description is as follows:

Amicus Mid-America Legal Foundation (MALF) was organized in 1975 as an Illinois not-for-profit corporation to engage in study, analysis, and legal advocacy for the benefit of the general public. MALF endeavors to address evolving

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[1] No part of the attached brief has been authored by counsel for either party. No persons other than the *amici curiae*, its members or their counsel made a monetary contribution to the preparation and submission of this brief.

concepts of law as they affect free enterprise and our democratic institutions, especially where the outcome of litigation could potentially cause disruption to our national commerce, and to provide legal representation on matters of public interest on all levels of the judicial process. MALF takes a special interest in actions that originate in or have a direct effect on the Midwest region.

Amicus Illinois Manufacturers Association (IMA) is an Illinois not-for-profit corporation founded in 1893 and is the oldest and largest statewide manufacturing association in the United States. IMA's membership numbers more than 4,700 Illinois manufacturing companies which employ over 80 percent of the total Illinois manufacturing workforce.

Amicus Chemical Industry Council of Illinois is the organization representing the chemical industry in Illinois. Currently, CICI has over 188 members who employ over 62,000 people in Illinois. The state's chemical industry produces over $23 billion worth of product each year, making it the third largest manufacturing sector in Illinois. In fact, 1.3 million Illinois employees work in industries dependent on chemical products.

SUMMARY OF ARGUMENT

I. The Issue: This case presents the question of whether a party who commenced litigation without standing to bring such a suit may be sanctioned under the attorney's fees provision of the Emergency Planning and Community Right-to-Know Act (hereinafter referred to as "EPCRA"). (42 U.S.C. § 11046.) There is a substantial probability that the Seventh Circuit was in error in denying the Steel Company's claims for attorneys fees.

A. Standing to sue is a fundamental element of propriety in federal court proceedings.

B. The statute granting attorneys fees follows the rule at common law.

1. United States practice requires explicit congressional authorization for an award of attorneys fees.

2. Common Law courts can award fees in appropriate amounts to prevailing parties.

3. The attorneys fees statute in question follows the common law rule, and does not distinguish between prevailing plaintiffs and defendants.

4. The plain meaning of the statute should be followed absent strong indications of contrary legislative intent.

5. The legislative history supports a review of the quality of plaintiffs cases, but does not specifically limit the language of the statute.

6. Lower court decisions on environmental fees statutes have used standards other than frivolousness to determine when awards for a successful party are appropriate.

7. Courts and commentators have relied primarily on civil rights statutes and precedents for interpretation of fee shifting statutes. The proper test is more general, and looks specifically at the equities which apply between parties under a fee shifting law.

II. There Are Strong Policy Reasons To Allow Awards To Prevailing Defendants.

A. The Steel Company, like all such defendants, has no choice but to be in court.

B. This Court made the probability of lack of standing to sue clear in several decisions which preceded CBE's filing suit against The Steel Company.

C. Environmental Litigation Organizations Are The Beneficiaries of "Citizens Litigation", Not Disinterested Proponents of the Public Good.

D. CBE and Other Potential Environmental Litigants Are Well Funded National Organizations, Not Impecunious Individuals. The Steel Company Is A Relatively Small Business.

III. Conclusion: This Court should grant certiorari and reverse the decision of the seventh circuit court of appeals holding successful defendants to a more difficult standard for obtaining an award of attorney's fees.

ARGUMENT

I. The Issue: This case presents the question of whether a party who commenced litigation without standing to bring such a suit may be sanctioned under the attorney's fees provision of the Emergency Planning and Community Right-to-Know Act (hereinafter referred to as "EPCRA"). (42 U.S.C. § 11046.) There is a substantial probability that the Seventh Circuit was in error in denying the Steel Company's claims for attorneys fees.

This Court made the determination that Citizens for a Better Environment lacked standing in *Steel Company v. Citizens for a Better Environment,* 118 S.Ct. 1003 (1998). Subsequent to that determination, the Steel Company sought attorney's fees pursuant to EPCRA, as a "prevailing party." Both the District Court and the Seventh Circuit have rejected this claim, and the Steel Company has petitioned this Court to review the Seventh Circuit's determination in *Citizens for a Better Environment v. Steel Co.,* No. 99-2709 (7th Cir. Oct. 17, 2000). This brief *amici curiae* supports the Steel Company's petition for certiorari.

A. Standing to sue is a fundamental element of propriety in federal court proceedings.

Standing to sue is a fundamental element of propriety in federal court proceedings. The Court has clearly established

a standing requirement and has grounded this requirement in Article III, section 2 of the Constitution, which grants the judiciary the power to hear "cases" and "controversies." The requirement that litigants demonstrate their standing to sue under the Constitution, the Court has said, confines the judiciary to its properly limited role in our system of separated powers, and helps ensure that cases filed in federal court involve the type of well-defined, adversarial contests which the courts are institutionally competent to resolve. (*See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-6 (1982); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1969).)

The Seventh Circuit, while recognizing Citizens for A Better Environment's lack of standing, ruled that the group's original suit was not "frivolous", and that the Steel Company's application for attorney fees should therefore be denied. (*Citizens for a Better Environment v. Steel Co.*, No. 99-2709 (7th Cir. Oct. 17, 2000).)

B. The statute granting attorneys fees follows the rule at common law.

1. United States practice requires explicit congressional authorization for an award of attorney's fees.

Attorney's fees generally are not a recoverable cost of litigation absent explicit congressional authorization. (*Runyon v. McCrary*, 427 U.S. 160, 185 (1976).) The Runyon Court, like many earlier decisions, followed the holding in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), in which the inclusion of attorneys' fees as damages was overturned on the ground that "[t]he general practice of the *United States* is in opposition [sic] to [fee shifting]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court [sic], till it is changed, or modified, by statute." (*Arcambel,* 3 U.S. (3 Dall.) at 306.) The

Arcambel holding differed from the "British Rule" applicable at common law.

2. Common Law courts can award fees in appropriate amounts to prevailing parties.

In England, fee-shifting (awards of attorneys' fees to prevailing parties in litigation) is authorized at the discretion of the court by statute. (*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).) Consequently, fee-shifting has been consistently and freely allowed in favor of prevailing parties since the year 1278. (*Id.*) Virtually every other legal system in the world also consistently awards attorneys' fees to prevailing parties. (*See generally* Walter K. Olson, *The Litigation Explosion* (1991).)

3. The attorneys fees statute in question follows the common law rule, and does not distinguish between prevailing plaintiffs and defendants.

The attorney's fees provision of EPCRA provides that attorneys fees may be awarded to a "substantially prevailing party" whenever the court finds the award to be "appropriate." (42 U.S.C. § 11046(f).) On its face, this provision would appear to do no more than restore the fee allocation rule applicable at common law. No preference in awards for either plaintiffs or for defendants is stated in the plain language of the statute.

4. The plain meaning of the statute should be followed absent strong indications of contrary legislative intent.

Ordinary canons of statutory interpretation do not call for courts to go beyond the four corners of the statute, where the meaning is clear. (*Caminetti v. U.S.*, 242 U.S. 470

(1917); *U.S. v. Revis*, 22 F. Supp. 2d 1242 (N.D. Okla.1998).) Legislative history is irrelevant to an unambiguous statute. (*In Re Moore*, 907 F.2d 1476 (4th Cir. 1990.)) Courts are bound to give effect to the literal meaning without consulting other indicia of intent or meaning when the meaning of the statutory text itself is plain or clear and unambiguous. (*American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).) Remarks of a legislator, even the sponsor of a bill, will not override the plain meaning of a statute. (*U.S. v. Tabacca*, 924 F. 2d 906 (9th Cir. 1991).)

Absent some indication to the contrary, a reasonable interpretation of the statute's plain meaning would appear to support application of the common law rule for allocation of responsibility for attorney's fees. The discretion of the court to award fees "where appropriate" which the statute provides for does not, again, differ significantly on its face from the similar discretion provided English courts under the common law rule. Any prevailing party should, under that rule, ordinarily be made whole by an appropriate award of attorney's fees from the party that loses. If a term used in a statute has a settled legal meaning, then courts will normally infer that the legislature intended to incorporate the established meaning. (*Martin v. Luther*, 689 F.2d 109 (7th Cir. 1982).) If a term has a common-law meaning, then such meaning may be preferred in a court's interpretation of a statute. (*Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911); *McCool v. Smith*, 1 Black (66 US) 459 (1861); *U.S. v. Palmer*, 3 Wheat (16 US) 610 (1818).)

5. The legislative history supports a review of the quality of plaintiffs cases, but does not specifically limit the language of the statute.

There is little substantive legislative history on attorney's fees provisions in environmental statutes. (Miller, "Private Enforcement of Federal Pollution Control Laws, Part III,"

14 ELR 10407, at 10409 (November 1984).) Reference is therefore usually made to the legislative history of Section 304 of the Clean Air Act of 1970 (42 U.S.C. 7604), the first of several environmental statutes containing similarly worded attorneys fee provisions. (*See* 42 U.S.C. 7607.) The Senate report for that bill noted that many Senators feared that Section 304 would be used to bring frivolous and harassing actions. An appropriateness standard, the Senate decided, "should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought." (S.Rep. No. 1196, 91st Cong., 2d Sess. 38 (1970).)

6. Lower court decisions on environmental fees statutes have used standards other than frivolousness to determine when awards for a successful party are appropriate.

Federal courts have found fees appropriate where a prevailing party has made a "substantial contribution" to reaching the goals of the statute. (*See Environmental Def. Fund v. EPA*, 672 F.2d 42 (DC Cir. 1982); *Village of Kaktoriak v. Watt*, 689 F. 2d 228 (DC Cir. 1982); *NRDC v. EPA*, 484 F. 2d 1331 (1st Cir. 1973).) The Senate Report's concern with "frivolous and harassing" actions would certainly appear to apply to actions brought by persons without standing to be in court in the first place. The statutory provision, on its face, does not require a finding of frivolousness by the other party to permit an award of attorney's fees.

Other courts have also held that a "prudent effort" standard should apply, which tests whether the suit was of a nature which the statute can fairly be read to have anticipated. (*See Northern Plains Resource Council v. EPA*, 670 F.2d 847 (9th Cir. 1982); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981).)

7. Commentators have relied primarily on civil rights statutes and precedents for interpretation of fee shifting statutes. The proper test is more general, and looks specifically at the equities which apply between parties under a fee shifting law.

Commentators opposing fees for prevailing defendants in environmental actions have relied on a non-environmental case, *Christiansburg Garment Company v. Equal Employment Opportunity Commission,* which held that, under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, fees should not be awarded to prevailing defendants unless the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation." (*Christiansburg v. EEOC*, 434 U.S. 412, 421 (1978).) This case is significant authority, but is not evidently controlling for all fee shifting statutes. These vary in their terms. In descending order, the prevailing plaintiff's or defendant's "entitlement" to attorneys' fees is strongest under relatively equal statutes like the Copyright Act, 17 U.S.C. § 505 (1994), strong but not unequivocal under 42 U.S.C. secs. 1988 (civil rights) and 12205 (disabilities), and always in serious question under the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. sec. 1132(g)(1). The ERISA provision is actually less strong in allowing an award to the usual defendant (the employer) than the "prevailing party" language of EPCRA is for a defendant company. ERISA provides that

> In any action under this subchapter . . ., the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. sec. 1132(g)(1).

Courts interpreting the ERISA provision have come up with a balancing test that may be relevant in considering the similar provisions of EPCRA. In *Gray v. New England Telephone and Telegraph Company*, 792 F.2d 251 (1st Cir. 1986), the court held that:

> "This discretion is not standardless. To channel its exercise, this court has cited five basic factors that customarily should be weighed in the balance: (1) the degree of culpability or bad faith attributable to the losing party; (2) the depth of the losing party's pocket, i.e., his or her capacity to pay an award; (3) the extent (if at all) to which such an award would deter other persons acting under similar circumstances; (4) the benefit (if any) that the successful suit confers on plan participants or beneficiaries generally; and (5) the relative merit of the parties' positions. See id. at 257-58. . . . The circuits agree that such compendia are exemplary rather than exclusive. . . . An inquiring court may—indeed, should—consider additional criteria that seem apropos in a given case. . . . In a word, the test for granting or denying counsel fees in an ERISA case is "flexible."

Gray, 792 F.2d at 258.

This Court, in *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546 (1986), addressed fee awards for plaintiffs in post-trial administrative proceedings, and held in that case that similar post-trial stage awards were allowable in an environmental suit for matters which had been held to be "reasonable" elements of attorneys fees in earlier civil rights cases. The Christianberg and other civil rights cases which were cited in *Delaware Valley* would, as that case was decided, apply only to the amount of any award, not to which party should receive same. The Court's decision did not address a standard of when an award to defendants would be appropriate, or whether the standard should be different from that applicable to plaintiffs.

The appropriate test, in other words, is not one which rewards one type of prevailing party over another. Rather, the standard courts should apply in interpreting a facially

neutral "prevailing party" attorneys fee awards statute is one of fairness and equity. In the absence of specific statutory language directing that awards go only to prevailing plaintiffs, a consideration of the equities such cases, and the general policy favoring compliance rather than penalty seeking as the primary goal of environmental enforcement, which would discourage litigation like that brought by CBE, may be appropriate.

II. There Are Strong Policy Reasons For This Court To Review The Decision To Deny Awards To Prevailing Defendants.

A. The Steel Company, like all such defendants, has no choice but to be in court.

In this case, the Steel Company had no choice but to be in court in the first instance, as it was the defendant in a case brought by Citizens for a Better Environment. Whether the Steel Company was prudent in defending itself, instead of settling, and whether CBE was merely engaged in unreasonable harassment, can best be determined by reviewing the cases on standing to sue for past actions which this Court had decided prior to the *Steel Company* decision.

B. This Court made the probability of lack of standing to sue clear in several decisions which preceded CBE's filing suit against The Steel Company.

The *Steel Company* decision which held that CBE was without standing to sue for past actions was only the most recent of several Court opinions which it clear that the proper interpretation of environmental statutes on citizen suits, and of Constitutional provisions relative to standing to bring action, encouraged citizen suits to prevent and eliminate ongoing violations of environmental laws, but prohibited them from suing for past actions.

On statutory interpretation, the leading case is *Gwaltney v. Chesapeake Bay Foundation.* (484 U.S. 49 (1987).) The case is consistent with the recent direction of Supreme Court standing doctrine. In that case, the Court held that the Clean Water Act citizen suit provision does not authorize filing suit based on violations which occurred wholly prior to the commencement of the litigation.

For standing in environmental cases, counsel for CBE and for the Steel Company should certainly have made their clients aware of the Court's holding in *Lujan v. National Wildlife Federation (Lujan I).* The Court, by a vote of 5 to 4, ruled that the National Wildlife Federation lacked standing to challenge a decision of the Bureau of-Land Management (BLM) to review the classification of federal lands and open them to various kinds of resource development. The Federation contended that the BLM had acted in violation of the Federal Land Policy and Management Act and had failed to prepare an environmental analysis as required by the National Environmental Policy Act. To establish its standing, the Federation filed affidavits of several of its members who asserted that they used land "in the vicinity" of federal lands affected by the agency's decision, and that opening these lands to development would interfere with "recreational use and aesthetic enjoyment" of the lands. (*Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).)

The Court further elaborated on standing doctrine in a second Lujan case. (*Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).) The most significant aspect of Lujan II is Justice Scalia's rejection of the idea that Congress can confer standing by adopting an expansive citizen suit provision. Defenders sought to establish its standing based on the provision of the Endangered Species Act which authorizes "any person" to bring a civil suit "to enjoin any person . . . who is alleged to be in violation of any provision of this chapter." To permit Congress to confer standing through such a provision, Justice Scalia said, would authorize in-

dividuals to sue to enforce the "undifferentiated public interest" in seeing that the laws are enforced. This would violate the principle of separation of powers, according to Justice Scalia, by "enabl[ing] the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department." The Justice, in this, echoed Congressional concerns noted in *Gwaltney*:

> "[T]he Committee intends the great volume of enforcement actions [to] be brought by the State."

(*Gwaltney of Smithfield, Ltd. v. Cheasapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), *quoting* S.Rep. No. 92-414, at 64 (1971).)

In light of the substantial caselaw and Congressional history concerning the proper role of citizen suits—pollution prevention, not criminal or quasicriminal prosecution for past misdeeds—an award of attorney's fees to the Steel Company for costs incurred in the course of reasserting existing standing and statutory doctrine would not seem unreasonable.

C. Environmental Litigation Organizations Are The Beneficiaries of "Citizens Litigation", Not Disinterested Proponents of the Public Good.

Environmental organizations have benefited substantially from citizen suit settlements and judgments. Due to the anti-business bias of many of the environmental organizations that engage in citizen suits, private industry is subject to more legal actions than either agricultural activities or governmental facilities. For example, between 1984 and 1988, environmentalist citizen suits against private industry were more than six times as common than suits against governmental facilities. (Michael Greve, "Private Enforce-

ment, Private Rewards," in *Environmental Politics: Public Costs, Private Rewards*, M. Greve and F. Smith, eds. (New York: Praeger, 1992), p. 111.) Some environmental groups have found that citizen suits can be a lucrative source of revenue (*Ibid.*, pp. 109-110.)

Such organizations may benefit directly from litigation expense awards or attorney's fee awards above the actual costs incurred. (*See, e.g. Environmental Defense Fund v. EPA*, 672 F.2d 42, 58 (D.C. Cir. 1982), *and see also Student Pub. Interest Research Group v. AT&T Bell Labs*, 643 F. Supp. 961 (D.N.J. 1986).) Where cases are settled, the groups usually demand that substantial amounts be paid through other environmental groups for "supplemental", "mitigation", or "credit" programs. (Greve, Michael S., "The Private Enforcement of Environmental Law", 65 *Tulane Law Review* (1990), pp. 339 *ff.*, *at* page 356.)

The use of supplemental environmental projects has been subject to increasing scrutiny. See, e.g., Mann, David S., Comment, "Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?", 21 ENVTL. L. 175 (1991); Stevens, Michael Paul, Note & Comment, "Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits", 10 GA. ST. U. L. REV. 757 (1994).

Citizen suit plaintiff organizations are not, therefore, properly regarded as purely altruistic guardians of an abstract public good. They are economic actors who can obtain substantial benefits from litigation. Citizens for a Better Environment is not a poverty-stricken individual with no recourse but an equal employment opportunity action. It is a national organization, and part of a set of well funded national environmental organizations, with active litigation programs, and substantial receipts to date from a wide variety of environmental litigation. The Court can direct

such private prosecutors to their proper duties by any means it determines to be appropriate, including attorneys fee awards where they ignore its relevant precedents and the text of the notice provision of the statutes pursuant to which they bring suit, without putting such organizations out of business.

D. CBE and Other Potential Environmental Litigants Are Well Funded National Organizations, Not Impecunious Individuals. The Steel Company Is A Relatively Small Business.

The relative sizes and abilities to bear the costs of counsel of the parties litigant do not indicate that the citizen litigants are "impoverished." Citizens for a Better Environment is, like other major environmental organizations which could bring similar suits in later actions, a nationwide organization. It had over 30,000 members and 180,000 contributors in 1995. (Complaint, paragraph 6.) CBE's Illinois office filed a Form 990 for tax year 1999 which indicated receipt of contributions of $1,932,456 in direct and indirect contributions. The Form 990 for 1997 indicated contributions of $2,030,582. (Source: www.guidestar.org, accessed March 9, 2001.) The Environmental Law and Policy Center of the Midwest, which appears as counsel for CBE in this matter, is another example of how well funded potential environmental organization plaintiffs can be. Data from the Guidestar website, which provides information from annual Form 990's for 640,000 organizations, profiles the ELPC as follows:

> **Financial Info**
> **Fiscal Year:** 1999
> **Assets:** $5,283,084
> **Income**: $3,430,000

(Source: http://www.guidestar.org/search/report/gs-report.adp?ein=36-3866530&org_name=&keywords=&

city=&state=IL&zip=&proximity=&subject=environment_all&foundn_irs=&revenue_cd=, accessed March 9, 2001.)

The Steel Company, by contrast, is a manufacturing organization which at the time of the litigation had approximately 100 employees. This is relatively small for the steel industry. For a company of this size, like any small manufacturing business, more than $270,000 in attorneys fees and costs to defend a case against a party without standing to bring suit is a substantial penalty. (Source for fee and cost amount: Stipulation cited in Petition for Writ of Certiorari, p. 8.)

III. Conclusion: This Court Should Grant Certiorari and Reverse the Decision of the Seventh Circuit Court of Appeals Holding Successful Defendants to a More Difficult Standard for Obtaining an Award of Attorney's Fees.

As set forth above, there are ample policy and legal reasons for this Court to review and reverse the decision of the Seventh Circuit Court of Appeals. The practical effect on enforcement of a decision to award attorney's fees to the Steel Company should also be considered. Allowing successful defendants to recover attorney's fees in a case such as this will not discourage well brought citizen suits; it will insure that they are pursued only when necessary to abate ongoing violations. Moreover, the Congressional Research Service, when reviewing the effect of the Court's earlier Steel Company decision, concluded that:

> If *Steel Co.* and *Laidlaw* (widely adopted) ultimately do reduce the number of citizen suits and their value as incentives for advance compliance, one should not assume that rampant flouting of environmental and other regulations will result. Nothing in these decisions impairs the enforcement ability of federal agencies, or state agencies under delegated federal programs.

(Robert Meltz, Congressional Research Service, Report for Congress, RS20012: *The Future of the Citizen Suit After Steel Co. and Laidlaw*, January 5, 1999, http://www.cnie.org/nle/rak-38.html#Back15, accessed February 8, 2001.)

A decision for the Steel Company on award of fees will insure that other relatively well funded environmental organizations will be encouraged to remember that Congress had a good reason for putting in EPCRA and similar environmental statutes the 60-day notice to prosecutors and the alleged violator. If a governmental prosecution is commenced or the alleged violator comes into compliance, the environmental group has fulfilled its mission and has no business proceeding.

The overarching goal of the citizen suit provisions is compliance, not punishment. It is respectfully submitted that it is in the interest of proper administration of the law and public policy for this Court to grant the Petition and ultimately reverse the decision below.

Respectfully submitted,

JAMES T. HARRINGTON
Counsel of Record
WILLIAM A. PRICE, *General Counsel*
Mid-America Legal Foundation
201 E. Loop Road
Wheaton, Illinois 60187
(630) 682-6042

Attorneys for Amici Curiae

Supreme Court, U.S.
FILED
MAR 19 2001
CLERK

No. 00-1146

IN THE

Supreme Court of the United States

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

HOLLY GORDON
CHICAGO LEGAL CLINIC
205 West Monroe Street
Fourth Floor
Chicago, Illinois 60606
(312) 726-2938

ROBERT MICHAELS
ROBINSON CURLEY & CLAYTON
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

HOWARD A. LEARNER
Counsel of Record
ALBERT F. ETTINGER
ENVIRONMENTAL LAW
AND POLICY CENTER
35 East Wacker Drive
Suite 1300
Chicago, Illinois 60601
(312) 673-6500

Attorneys for Respondent

165906

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Court held in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986), and in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987), that the attorney's fee-shifting provision of the Clean Air Act shares a "common purpose" and should be interpreted "in the same manner" as similar provisions in the civil rights laws. 478 U.S. at 560. In *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), this Court held that prevailing civil rights plaintiffs can obtain their attorney's fees, but prevailing defendants cannot charge their attorney's fees unless a plaintiff's lawsuit was "frivolous." In this case, the plaintiff's environmental enforcement claim was not frivolous, and the court of appeals below has now joined another circuit and several lower courts in applying the standard set forth in the two *Delaware Valley* decisions and in *Christiansburg* to several environmental laws. The question presented is:

Should the Court apply the two *Delaware Valley* decisions and *Christiansburg* to this case brought under the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11001, *et seq.*, which is an environmental statute that has an attorney's fee-shifting provision similar to and modeled after that in the Clean Air Act?

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STATEMENT OF JURISDICTION

The judgment of the court of appeals, entered on October 17, 2000, denied Petitioner's motion for attorney's fees under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(f). Petitioner's App. 1a-20a. Petitioner attempts to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1). However, there is no subject matter jurisdiction because EPCRA's fee-shifting provision itself does not independently confer jurisdiction, and the Court already determined that there is no jurisdiction over Respondent's underlying EPCRA claim. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

STATEMENT OF CASE

A. The Issue. This case involves no novel issues and no split among the circuits. The decision below was a proper adjudication and application of settled law governing the allocation of attorney's fees. Petitioner is a steel company that, as a defendant in the original proceedings, admittedly violated EPCRA for eight years. It now seeks to charge its attorney's fees against a grassroots citizens' organization plaintiff that brought a non-frivolous environmental enforcement action, which was ultimately dismissed for lack of standing. *See Steel Co.*, 523 U.S. at 109-10. The district court denied Petitioner's attorney's fee demand for lack of jurisdiction. On appeal, the United States Court of Appeals for the Seventh Circuit held that the Court's decisions in *Pennsylvania v. Delaware Valley Citizens' Council ("Delaware Valley I")*, 478 U.S. 546 (1986), and *Pennsylvania v. Delaware Valley Citizens' Council ("Delaware Valley II")*, 483 U.S. 711 (1987), and in *Christiansburg Garment Co. v. Equal Employment*

Opportunity Comm'n, 434 U.S. 412 (1978), are controlling, and they preclude awarding attorney's fees to Petitioner because the Respondent's claim was not frivolous. App. 3a-5a.

Christiansburg holds that, under § 1988, prevailing plaintiffs can recover their attorney's fees from defendants, but prevailing defendants can charge their fees only if the plaintiff's claim was "frivolous" or brought in "bad faith." 434 U.S. at 421. In *Delaware Valley I*, the Court held that "[g]iven the common purpose of both § 304(d) [the Clean Air Act's fee-shifting provision, 42 U.S.C. § 7604(d)] and § 1988 [the Civil Rights Act] to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." 478 U.S. at 560. The Court's follow-up decision in *Delaware Valley II* states that, in applying the fee-shifting provision of the Clean Air Act, "courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988." 483 U.S. at 713 n.1. This differential standard fulfills Congress' objective of encouraging citizen enforcement of the environmental and civil rights laws while protecting defendants from frivolous claims.

B. History of Proceedings. Petitioner Steel Company concedes that it violated EPCRA for eight years by failing to provide required "community right-to-know" annual reports that disclose the toxic chemicals stored and emitted by its steel plant in a Chicago neighborhood, including hundreds of thousands of pounds of hydrochloric acid, which is an extremely hazardous substance. *See* 40 C.F.R. § 355 App. A. The purpose of EPCRA is to "inform the public about the presence of hazardous toxic chemicals" and to encourage

reduction in toxic chemical hazards. *Steel Co.*, 523 U.S. at 86. Since 1988, EPCRA has helped to reduce toxic chemical emissions across the nation by 45%. *See* Luke C. Hester, *Environmental News* at *www.epa.gov/tri/tri98/press/r-65.pdf* (May 11, 2000).

Respondent Citizens for a Better Environment is a not-for-profit organization that uncovered Petitioner's environmental violations. Respondent filed a 60-day notice of intent to sue letter and, then, filed a lawsuit under EPCRA's citizen suit provision, 42 U.S.C. § 11046. This provision is "substantially similar" to citizen suit and fee-shifting provisions under almost all of the federal environmental laws. Pet. at 6; App. at 14a.

Because Petitioner had submitted the required toxic chemical disclosure information before the complaint was filed, the district court dismissed the original lawsuit. The Seventh Circuit reversed the district court and ruled in favor of Respondent. Petitioner raised, for the first time, the argument that Respondent lacked Article III standing, and certiorari was granted. The Solicitor General argued on behalf of Respondent, and fifteen state attorneys general supported Respondent's position. The Court reversed the Seventh Circuit and held that "respondent lacks [Article III] standing to maintain this suit, and . . . we and the lower courts lack jurisdiction to entertain it." *Steel Co.*, 523 U.S. at 100. The Court did not reach the merits of the case. *Id.*

Petitioner then moved for attorney's fees under the fee-shifting provision of EPRCA. 42 U.S.C. § 11046(f). Respondent objected on three grounds: (1) the lack of jurisdiction over the underlying EPCRA claim necessarily meant that there could be no jurisdiction over the fee motion;

(2) Petitioner was not a "prevailing party" for the purposes of EPCRA § 11046(f) because it won on solely jurisdictional grounds and not on the merits; and (3) *Delaware Valley I & II* and *Christiansburg* applied to EPCRA § 11046(f) and barred any attorney's fees because plaintiff's claim was not frivolous or brought in bad faith.

The district court agreed with Respondent's first argument and denied the fee motion for lack of jurisdiction. On appeal, the Seventh Circuit disagreed with the first and second arguments, but agreed with the third and, therefore, denied the motion. The Seventh Circuit found that the *Delaware Valley I & II* and *Christiansburg* standard is controlling in this case because there is no identifiable "feature in the language or structure of § 11046(f) [the EPCRA fee-shifting provision] that distinguishes it from the statute [Clean Air Act] in *Delaware Valley*." App. 14a. In so holding, the Seventh Circuit joined the Ninth Circuit in concluding that the attorney's fee-shifting standard should be applied "in the same manner" for both environmental and civil rights laws. App. 15a; *see Morris-Smith v. Moulton Niguel Water Dist.*, Nos. 99-55350, 99-55865, 2000 U.S. App. Lexis 21502 (9th Cir., Aug. 21, 2000); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094-95 (9th Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000); *Washington Wilderness Coalition v. Hecla Mining Co.*, Nos. 97-35565, 97-35754, CV-94-00233-FVS, 1998 WL 515365 (9th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999). The Seventh Circuit then denied the Petitioner's motion for attorney's fees because the Respondent's claim was not frivolous:

> A panel of this court held that CBE [Citizens for a Better Environment] was entitled to proceed. The Solicitor General supported that decision

> before the Supreme Court. A suit strong enough to survive an appeal cannot be deemed frivolous even if all nine Justices thought it unavailing . . . No one suggests that CBE's claim was frivolous on the merits, however, for The Steel Company concededly filed reports after the statutory deadline.

App. 15a.

The balance that Congress and the Court struck with the environmental and civil rights fee-shifting provisions has worked. It protects corporate defendants from frivolous lawsuits while allowing not-for-profit organizations and individuals with limited resources to serve as "private attorneys general" in suing violators as Congress intended. Contrary to Petitioner's rhetoric, the Respondent in this case is not "well-equipped to pursue extensive EPCRA litigation" (Pet. at 6), and the Petitioner does have substantially more financial resources. Petitioner The Steel Company has $31 million in annual sales revenues. Dun & Bradstreet, Inc., U.S. Company Reports, The Steel Co. Business Background Report (2001). Respondent Citizens for a Better Environment has annual revenues of less than $2 million. Altschuler, Melvoin and Glasser, L.L.P., 1999 Independent Auditors' Report for Citizens for a Better Environment.

In addition, Petitioner's repeated contentions that the applicable fee standard has caused an "explosion" in the number of environmental citizen suits is incorrect; in fact, they have steadily declined over the past six years.[1] Petitioner states that "citizen suits brought under EPCRA against

1. *See infra* at 18 and n.4.

non-governmental defendants have resulted in reported decisions in nine cases." Pet. at 25. Only nine court decisions in the fifteen years since EPCRA was enacted in 1986 is barely a "pop," and certainly not an "explosion." Respondent's EPCRA claim was reasonable and not frivolous. Petitioner's attempt to charge its attorney's fees against this grassroots not-for-profit group would chill responsible citizen enforcement of the environmental laws, and it should be denied.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states that certiorari should be "granted only for compelling reasons" and establishes three basic criteria for reviewing petitions from federal appellate court decisions: (1) whether the decision creates or deepens a conflict among circuits; (2) whether the decision addresses "an important question of federal law that has not been, but should be, settled by this Court;" and (3) whether the decision "conflicts with relevant decisions of this Court." None of these criteria is present in this case, and there are no other "compelling reasons" for granting *certiorari*.

The Seventh Circuit's decision is a straightforward application of settled Supreme Court precedent, and it is completely consistent with the Ninth Circuit's and several district courts' decisions involving the attorney's fee-shifting provisions for citizen enforcement of the Clean Air Act, Clean Water Act, Endangered Species Act and other environmental laws. *See, e.g.*, *Marbled Murrelet*, 182 F.3d at 1094-95 (Endangered Species Act). The attorney's fees provisions in all of these statutes are virtually identical to the language in EPCRA. *Compare* EPCRA, 42 U.S.C. § 11046(f) *with* Clean Air Act, 42 U.S.C. § 7604(d), *and* Clean Water Act,

33 U.S.C. § 1365(d). The legislative history of these environmental laws, as explained below, likewise confirms that Congress intended that the same standards apply to fee-shifting provisions in environmental citizen suits as in civil rights actions.

Petitioner nevertheless asks the Court to ignore the settled law of *Delaware Valley I & II* for environmental cases and limit *Christiansburg* to civil rights cases. Petitioner would instead substitute an approach allowing prevailing defendants to charge attorney's fees when the plaintiff's enforcement claims are unsuccessful, even though not frivolous. This approach draws from the Court's decision on an attorney's fee petition under the Copyright Act in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). Petitioner relies on the same arguments made in the two unsuccessful certiorari petitions from the Ninth Circuit's recent decisions in *Marbled Murrelet* and *Washington Wilderness Coalition*, but still insists that the question of which standard should govern environmental fee-shifting provisions demands the Court's attention. As explained below, it does not:

- There is no split among the circuits on this issue.

- The Court settled the question in *Delaware Valley I & II.*

- *Fogerty* does not compel a different answer. The factors supporting the differential standard in *Christiansburg*, which *Fogerty* found inapplicable to copyright cases, are fully present in environmental cases.

- Petitioner's policy claims lack merit and are more appropriately raised with Congress, rather than before the Court.

Finally, even if the Court were inclined to revisit *Delaware Valley I & II* and *Christiansburg*, this case would be a poor vehicle. Because the Court determined that there was no jurisdiction over Respondent's EPCRA claim, there cannot be jurisdiction to consider Petitioner's motion under EPCRA's attorney's fee provision. Moreover, because Petitioner did not prevail on the merits, but solely on jurisdictional grounds, it is not a "prevailing party" for fee purposes.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS, WHICH AGREE THAT *DELAWARE VALLEY I & II* AND *CHRISTIANSBURG* APPLY TO ENVIRONMENTAL STATUTE FEE-SHIFTING PROVISIONS.

The decision below does not "conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. Rule 10(a). Petitioner admits that the only two courts of appeals to address the question presented – the Seventh Circuit and the Ninth Circuit – agree that the *Delaware Valley I & II* and *Christiansburg* standard governs attorney's fee awards in environmental cases. Pet. at 2-3.

The Seventh Circuit's decision in this case is completely consistent with the Ninth Circuit's decision in *Marbled Murrelet* under the Endangered Species Act. 182 F.3d at 1091. The Ninth Circuit held that because "the Supreme Court indicated [in *Delaware Valley*] that attorney's fees provisions in environmental statutes with similar language and purpose as the attorney's fees provision in the Civil Rights Act should be interpreted in the same way, . . . the *Christiansburg* standard for prevailing defendants applies in this case."

Id. at 1096. The Ninth Circuit reaffirmed its prior holding in *Razore v. Tulalip Tribes*, 66 F.3d 236 (9th Cir. 1995), in which it "adopted for RCRA [Resource Conservation and Recovery Act] and the CWA [Clean Water Act] the *Christiansburg* civil rights standard" for determining when defendants can charge attorney's fees. *Marbled Murrelet*, 182 F.3d at 1094; *see also Morris-Smith*, 2000 U.S. App. Lexis 21502 at *5-6; *Washington Wilderness Coalition*, 1998 WL 515365 at *1. Numerous district courts have likewise applied the *Christiansburg* standard to the fee-shifting provisions of environmental statutes. *See, e.g., Atlantic States Legal Found. v. Onodaga Dep't of Drainage*, 899 F. Supp. 84, 87 (N.D.N.Y. 1995) (Clean Water Act); *National Wildlife Fed. v. Consumers Power Co.*, 729 F. Supp. 62, 63-64 (W.D. Mich. 1989) (Clean Water Act); *Consolidated Edison Co. v. Realty Inv. Assoc.*, 524 F. Supp. 150, 153 (S.D.N.Y. 1981) (Clean Air Act).

There is no split among the circuits, and Petitioner candidly acknowledges that the current "situation is likely to continue." Pet. at 4. This prospect of an expanding consensus among the circuits is a reason for denying certiorari, not granting it.

II. THE COURT HAS ALREADY SETTLED THIS ATTORNEY'S FEE ISSUE IN *DELAWARE VALLEY I & II* AND *CHRISTIANSBURG*.

The second relevant criterion in Rule 10 – whether the lower court "has decided an important question of federal law that has not been, but should be, settled by this Court" – is also absent here. Sup. Ct. Rule 10(c). The Court already settled this issue in *Delaware Valley I & II*, which the

Seventh Circuit correctly interpreted as allowing defendants to charge their attorney's fees against citizen suit plaintiffs only if the claims were frivolous. App. 15a. *Delaware Valley I & II* involved the Clean Air Act, but as the Seventh Circuit stated, "[t]he Steel Company has not identified any feature in the language or structure of [EPCRA] § 11046(f) that distinguishes it from the statute [Clean Air Act] in *Delaware Valley*." App. 14a. Petitioners concede that the language in EPCRA "is identical to virtually all other fee-shifting provisions in federal environmental laws." Pet. at 2.

Seeking to escape this settled law, Petitioner insists that the Seventh Circuit, Ninth Circuit and other lower courts have all been "confused" by what it wrongly dismisses as "dictum" in *Delaware Valley I & II*. Pet. at 13. The courts are not the confused parties here.

In *Delaware Valley I*, the Court held that "[g]iven the common purpose of both § 304(d) [the Clean Air Act's fee shifting provision, 42 U.S.C. § 7604(d)] and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." 478 U.S. at 560. The Court supported this conclusion with legislative history indicating that Congress enacted § 304(d) "specifically to encourage 'citizen participation in the enforcement of standards and regulations established under this Act' and 'to afford . . . citizens . . . very broad opportunities to participate in the effort to prevent and abate air pollution'." *Id.* (internal citations omitted).

The Court reaffirmed its holding in a follow-up decision, stating that "[l]ast term . . . we agreed with the Court of Appeals that in awarding attorney's fees under § 304(d) the

courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988." *Delaware Valley II*, 483 U.S. at 713 n.1. One of the central principles governing fee awards under § 1988 is the *Christiansburg* standard that prevailing plaintiffs may recover attorney's fees, but prevailing defendants may not do so unless a plaintiff's claim was frivolous. That explains why, in *Fogerty*, Justice Thomas recognized that *Delaware Valley* "impose[d] [the] 'dual' standard of recovery" in environmental cases. 510 U.S. at 538. (Thomas J., concurring) (*citing Delaware Valley II*).

Delaware Valley I & II are not "confusing" at all. They state the straightforward legal conclusion that environmental fee-shifting provisions should be applied in the same manner as in § 1988. The Seventh Circuit correctly held that this conclusion "formed the basis of the Court's disposition and therefore cannot be treated as dictum." App. 14a.

III. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE COURT'S DECISIONS IN *DELAWARE VALLEY I & II, CHRISTIANSBURG* AND *FOGERTY.*

The Seventh Circuit's decision also does not "conflict with relevant decisions of this Court." Sup. Ct. Rule 10(c). *Delaware Valley I & II* are directly on point. Furthermore, even if *Delaware Valley I & II* did not exist, *Christiansburg* would still compel the same standard for attorney's fees in this case, and *Fogerty* would not change that result.

In *Christiansburg*, the prevailing defendant filed a petition under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) ("in its

discretion, [the court] may allow the prevailing party a reasonable attorney's fee"). This civil rights fee-shifting provision closely resembles EPCRA § 11046(f). The Court rejected defendant's argument, also made by Petitioner here (Pet. at 17), that the statute's facial neutrality required use of the same fee-shifting standard for both prevailing plaintiffs and defendants: "the permissive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction." *Christiansburg*, 434 U.S. at 418.

The Court instead adopted the differential standard allowing plaintiffs to recover their fees as a matter of course, but restricting defendants to charging their attorney's fees against plaintiffs only in cases that are "frivolous" or brought in "bad faith." *Id.* at 418-21. The Court stated that civil rights plaintiffs are "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority," and recognized that a plaintiff's fees are awarded "against a violator of federal law." *Id.* at 418 (internal citations omitted). Moreover, the legislative history indicates that the fee provision was meant to facilitate plaintiffs' claims while still protecting defendants from "frivolous suits." *Id.* at 420.

Petitioner insists that *Christiansburg* is not controlling, arguing that the standard adopted by the Court for the fee-shifting provision of the Copyright Act (17 U.S.C. § 505) in *Fogerty* should apply instead. Petitioner's argument is incorrect. *Fogerty* rejected the differential or "dual standard" because "the factors relied upon in our *Christiansburg* opinion . . . are absent in the case of the Copyright Act." 510 U.S. at 523 (footnote omitted). In particular, the Court stressed that "the policies served by the Copyright Act are

more complex [and] more measured" than those of civil rights laws, which principally aim to discourage unlawful discrimination. *Id.* at 526.[2]

In the environmental law context, however, all of the *Christiansburg* factors are present, and they require use of the differential standard here. Regarding the *first* factor, just like the civil rights laws, the environmental laws have a straightforward policy goal: to protect public health and the environment. As *Delaware Valley I* makes clear, the environmental and civil rights laws' fee-shifting provisions have the "nearly identical" and "common purpose" of allowing citizens to serve as "private attorneys general" in enforcing the statutory policies. 478 U.S. at 559-60; *see also Marbled Murrelet*, 182 F.3d at 1095 (noting "similarity in language and purpose between the attorney's fees provisions of the Civil Rights Act and the ESA [Endangered Species Act]").

Petitioner argues that citizens are supposedly not the "chosen instrument" of Congress to enforce environmental laws, and the first *Christiansburg* factor is absent here.

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2. *Fogerty* also emphasized that section 501 was largely imported from the 1909 Copyright Act and thus could not have been modeled on civil rights fee-shifting provisions. 510 U.S. at 524 & n.9 (noting that "Congress, in enacting § 505 of the 1976 Copyright Act could not have been aware of the *Christiansburg* dual standard as *Christiansburg* was not decided until 1978"). By contrast, most environmental fee-shifting provisions were directly or indirectly modeled on their civil rights counterparts. Also, EPCRA § 11046(f) and many other environmental statutes were adopted after *Christiansburg* and even *Delaware Valley I* were decided, and thus Congress had no reason to expect that the differential standard would apply.

Pet. at 22. However, just as with many civil rights statutes, the enforcement regimes of EPCRA and most other environmental statutes involve complementary government action and private citizen suits. Under EPCRA, Respondent was obligated to first file a notice of intent to sue letter with the United States Environmental Protection Agency and the state in which the violation occurred. Although either could have then brought an enforcement action, they instead allowed the citizen enforcement suit to go forward.

Similarly, most civil rights plaintiffs must first file a charge with the Equal Employment Opportunity Commission ("EEOC"), which can prosecute the case on its own, or, instead, allow the private action to go forward. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1); Americans with Disabilities Act, 42 U.S.C. § 12117(a); Age Discrimination in Employment Act, 29 U.S.C. § 626. The EEOC can prosecute civil rights cases even without employee charges or after such private charges are dropped. *See, e.g.*, *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1536 (2d Cir. 1996); *see also General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) ("EEOC is not merely a proxy for victims of discrimination [but is] . . . guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement'") (quoting 118 Cong. Rec. 4941 (1972)). Petitioner's argument that "chosen instrument," as used in *Christiansburg*, essentially means "exclusive instrument" is wrong.

Petitioner also quotes *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), out of context, to argue that promoting citizen enforcement is somehow not a primary purpose of citizen suit and fee-shifting provisions. *Ruckelshaus* held that

the Clean Air Act's fee-shifting provision, which on its face has no "prevailing party" requirement, nevertheless requires some success on the merits for a fee award. 463 U.S. at 493-94. At the end of its analysis, the Court noted that § 304(d) can "check the multiplicity of potentially meritless suits," but, in context, that language does not define the principal purpose of environmental fee-shifting provisions. *Id.* at 692-93 (internal quotation omitted). Instead, it simply acknowledges that preventing "meritless" suits was sufficiently important to warrant finding a "prevailing party" requirement in § 304(d). *Id. Ruckelshaus* also quotes legislative materials that define "meritless" to mean "frivolous" or "harassing," thus making it clear that the Court was not suggesting that environmental plaintiffs should pay fees for bringing reasonable, but ultimately unsuccessful, enforcement actions. *Id.* at 692 n.13.

Moreover, *Delaware Valley I* was decided after *Ruckelshaus*. The Court looked to the legislative history of § 304(d) and found that Congress enacted it "specifically to encourage 'citizen participation in the enforcement of standards and regulations established under this Act' and 'to afford . . . citizens . . . very broad opportunities to participate in the effort to prevent and abate air pollution'." *Delaware Valley I*, 478 U.S. at 560 (internal citations omitted).

Petitioner ignores the *second Christiansburg* factor: that a prevailing civil rights plaintiff receives its attorney's fees from a defendant that has violated federal law. This likewise applies to plaintiffs filing citizen suits against defendants, such as the Petitioner, that have violated EPCRA or other environmental laws.

Regarding the *third Christiansburg* factor, the legislative history of environmental fee-shifting provisions shows that Congress intended that fees be charged only against those plaintiffs who have brought frivolous or harassing suits. For example, the Senate Report on the Clean Air Act, which provides for fee awards to "any party, whenever the court determines such award is appropriate" (Section 304(d); 42 U.S.C. § 7604(d)), explains that this section allows courts to award fees "to defendants where the litigation was obviously frivolous and harassing. This should . . . discourag[e] abuse of this provision, while at the same time encouraging the quality of the actions that will be brought." S. Rep. No. 1196, 91st Cong., 2d Sess. 38-39 (1970). The legislative history of nearly every subsequent environmental statute reveals the same intent, such as the following Senate Report language on the fee-shifting provision of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d):

> The provision is not meant to deter citizens from bringing good faith actions to insure the Act is being enforced by the prospect of having to pay their opponent's counsel fees should they lose. Under this section, a defendant can be awarded reasonable fees from the citizen only if he can show that the citizen brought the action in "bad faith." This is similar to other citizen suit provisions involving the award of attorney's fees.

S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977).

Petitioner argues that EPCRA's legislative history provides no similar guidance, but then concedes that the language in EPCRA § 11046(f) is "substantially similar to

language used in fee-shifting provisions included in environmental statutes adopted in the 15 years prior to adoption of EPCRA in 1986." Pet. at 6. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (Age Discrimination in Employment Act). Furthermore, Congress passed EPCRA in late 1986 after the Court had already decided *Delaware Valley I*, and nothing in EPCRA's legislative history indicates that this decision should not govern the statute's fee-shifting provision.

All of the three primary factors identified in *Christiansburg* supporting the differential standard are thus present in the environmental context, and nothing in *Fogerty* changes that conclusion. Petitioner then reaches to suggest a new factor: that the typical environmental plaintiff supposedly has substantial financial resources. Pet. at 24-30. First, *Christiansburg* did not rest on the relative disparity of resources between plaintiffs and defendants and, in fact, specifically recognized that civil rights defendants could be impecunious. 434 U.S. at 422 n.20.[3] Second, Petitioner does not and cannot offer any real evidence to support its "Goliath" environmental group rhetoric. Pet. at 24-25, 27. For example, in this case, Respondent Citizens for a Better Environment is a not-for-profit

3. The Court added that the fee-shifting provision at issue gave courts sufficient flexibility to address such inequities in other ways. *Christiansburg*, 434 U.S. at 422 n.20. In addition, a defendant's inability to pay, as well as other equitable issues, can and should be part of any fee-shifting determination. *See, e.g., Adkins v. Briggs & Stratton Corp.*, 159 F.3d 306, 307 (7th Cir. 1998) (considering such factors in awarding fees under the Americans with Disabilities Act).

grassroots organization with under $2 million of annual revenues, and Petitioner The Steel Company has $31 million in annual sales revenues. Respondent is the "David" here, and Petitioner is the "Goliath," not the other way around.

IV. PETITIONER'S UNFOUNDED POLICY ARGUMENTS DO NOT WARRANT GRANTING CERTIORARI.

Even though none of the Rule 10 criteria is present here, Petitioner argues that the Court should still grant review because, as a policy matter, the settled law is supposedly inflicting widespread hardship on the business community, among other things. These policy arguments lack merit and, in any event, are more appropriately directed to Congress.

First, Petitioner repeatedly claims that there is an "explosion" of environmental citizen suits. Pet. at 2, 4, 29. Those claims are undermined by Petitioner's acknowledgment that there have been only nine reported decisions in "citizen suits brought under EPCRA against non-governmental defendants" since the statute was enacted in 1986. Pet. at 25. Nine reported cases in fifteen years amounts to less than one case per year – hardly an "explosion." Statistics compiled by the Administrative Office of the United States Courts show that the number of citizen suits under *all* environmental statutes has steadily and significantly *declined* from 653 in 1994 to 403 in 1999.[4]

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4. In 1994, 653 environmental citizen suits were filed against private corporations, state governments and municipalities; the statistics do not break out the lesser number of suits filed against private corporations. The combined number of suits fell to 623 in 1995, 616 in 1996, 469 in 1997, 427 in 1998 and 403 in 1999. (Cont'd)

Second, Petitioner argues that the differential standard somehow gives plaintiffs an incentive to bring dubious and harassing suits, while its preferred approach would not unduly chill citizen enforcement. Pet. at 26-30. Not so. As Petitioner acknowledges, environmental plaintiffs, unlike civil rights plaintiffs, generally cannot obtain damage awards, and any civil fines are paid to the federal treasury. Pet. at 23. Environmental plaintiffs must compensate their own attorneys and incur other costs every time they bring a citizen suit, as attorney's fees are only available if they prevail. Therefore, environmental plaintiffs have a strong incentive to avoid weak lawsuits, and *Christiansburg* already provides a safeguard against frivolous claims. If environmental plaintiffs were forced to pay defendants' attorney's fees in reasonable, though ultimately unsuccessful, cases, it certainly would deter citizen suits, and Congress' goal of encouraging private attorneys general to bring enforcement actions would be undermined.

Finally, Petitioner's claim that environmental groups have unfair leverage and extract "tribute" from companies by forcing them to generously settle meritless claims is colorful, but incorrect. Pet. at 11, 29-30. If the lawsuit so lacks merit that it is "frivolous," then a plaintiff has no leverage. Nor can environmental group plaintiffs threaten defendants with the prospect of jury awards and punitive damages. Citizen suits cannot result in a civil fine larger than what a federal judge is willing to impose, and companies will likely settle only if they believe that doing so is preferable to paying the civil penalty warranted by their

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(Cont'd)
See Judicial Business of the United States Courts, at *www.uscourts.gov/news.html*. The statistics for 1994-1996 are obtained from the Administrative Office of the United States Courts.

violations. In any event, all civil defendants can claim that their inability to recover attorney's fees under the ordinary "American Rule" creates settlement pressure, even in cases they might consider to be winnable.

V. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR REVIEWING THE QUESTIONS PRESENTED BECAUSE THERE IS NO SUBJECT MATTER JURISDICTION.

Even if review of this petition were warranted under Rule 10, this case would still be the wrong vehicle because there is no subject matter jurisdiction to consider Petitioner's fee motion. The Court previously held that because Respondent lacked standing to bring its EPCRA claim, "we and the lower courts lack jurisdiction to entertain it." *Steel Co.*, 523 U.S. at 110. The district court consequently denied Petitioner's fee motion, finding that without jurisdiction over any substantive EPCRA claim, it had no jurisdiction to apply EPCRA's fee-shifting provision. App. at 23a. ("the fact that EPCRA authorizes courts the discretion to award attorney's fees does not, by itself, constitute an independent grant of jurisdiction"). The Seventh Circuit disagreed and reasoned that because "[c]ourts that lack jurisdiction with respect to one kind of decision may have it with respect to another," the lack of jurisdiction over Respondent's EPCRA claim did not eliminate jurisdiction over Petitioner's EPCRA fee motion. App. at 3a (internal citations omitted). Although this quoted rule may be generally true, it does not apply here.

Federal courts have no subject matter jurisdiction over a claim or issue unless such jurisdiction is consistent with the Constitution *and* authorized by Congress. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

Jurisdiction over Petitioner's fee motion, however, is not "authorized by Congress" because EPCRA § 11046(f) does not independently confer subject matter jurisdiction; instead, it depends on a cognizable case "brought under" the statute's substantive provisions. 42 U.S.C. § 11046(f); *see also W.G. v. Senatore*, 18 F.3d 60, 64 (2d Cir. 1994) ("fee-shifting provisions cannot themselves confer subject matter jurisdiction"). Because the Court has already ruled that there is no cognizable EPCRA case here, there is no jurisdiction to apply that statute's fee-shifting provision. *Steel Co.*, 523 U.S. 110.[5]

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5. This EPCRA case is distinct from non-substantive statutes in which Congress specifically conferred jurisdiction to award fees and costs despite the lack of jurisdiction over an underlying claim. *See, e.g.*, 28 U.S.C. § 1919 (court "may order payment of just costs" upon dismissal for lack of subject matter jurisdiction); 28 U.S.C. § 1447(c) (court may order payment of fees and costs after wrongful removal). Such fee awards are collateral to the merits and serve primarily to protect the judicial system, not to reward victorious litigants. The same is true for Federal Rule of Civil Procedure 11 sanctions, which is why the Court held that fees can be imposed under Rule 11 without subject matter jurisdiction over the underlying case. *Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992).

The Seventh Circuit relied upon *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), to find jurisdiction, but that case is irrelevant. *Charles* affirmed an award under § 1988 for the fees that plaintiff incurred in defending an appeal that was dismissed for lack of jurisdiction. The district court had jurisdiction to award those fees because it had jurisdiction over plaintiff's underlying § 1983 claim. In this case, the problem is not that Petitioner seeks fees incurred in a *phase* of the proceedings over which a court lacked jurisdiction. Instead, there is no jurisdiction because Petitioner is seeking fees pursuant to a statute under which the Court has already determined in *Steel Co.* that no claim exists, and no court has the power to apply in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

HOLLY GORDON
CHICAGO LEGAL CLINIC
205 West Monroe Street
Fourth Floor
Chicago, Illinois 60606
(312) 726-2938

ROBERT MICHAELS
ROBINSON CURLEY & CLAYTON
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

HOWARD A. LEARNER
Counsel of Record
ALBERT F. ETTINGER
ENVIRONMENTAL LAW
AND POLICY CENTER
35 East Wacker Drive
Suite 1300
Chicago, Illinois 60601
(312) 673-6500

Attorneys for Respondent

Date: March 19, 2001

Supreme Court, U.S.
FILED
APR 4 2001
CLERK

(5)

No. 00-1146

IN THE
Supreme Court of the United States

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

Sanford M. Stein
Leo P. Dombrowski
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Date: April 4, 2001

AMERICAN FINANCIAL PRINTERS • WASHINGTON, DC • (202) 457-0030

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REPLY BRIEF FOR PETITIONER

Respondent Citizens for a Better Environment ("CBE") does not take issue with the principal contentions made in the Petition. It does not contest that the fee-shifting provision of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(f), does not distinguish between prevailing plaintiffs and prevailing defendants and contains no language suggesting that prevailing defendants are any less deserving of fees than prevailing plaintiffs. Nor does CBE dispute that the Court, when faced with virtually identical language in the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. § 505, held that prevailing defendants should be placed on an equal footing with prevailing plaintiffs in determining whether an award of fees is warranted. *Fogerty v. Fantasy,* 510 U.S. 517, 534 (1994). CBE does not dispute that the Court decision upon which the Seventh Circuit principally relied, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986), involved a prevailing plaintiff, not a prevailing defendant; addressed the proper size of the plaintiff's fee award, not the issue whether an award was warranted; and is silent on the issue of whether prevailing plaintiffs and prevailing defendants in environmental cases should be treated differently with respect to fee requests. Finally, CBE does not deny that, in sharp contrast to the pattern under civil rights statutes, a substantial majority of suits filed under environmental citizen-suit provisions is filed by well-established environmental groups that tend to file many such cases.

Because it cannot avoid making those concessions, CBE attempts simply to foreclose any consideration of The Steel Company's claims by asserting that the Question Presented by the Petition has already been decided against The Steel Company. Opp. Br. 11-18. But as noted above and in the Petition, the facts in *Delaware Valley* are so far afield from

the facts here that that case cannot reasonably be viewed as having decided the Question Presented. CBE's reliance on *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978), is similarly misplaced. *Christiansburg* adopted a "dual standard" in *civil rights* fee-award cases: prevailing civil rights plaintiffs are presumptively entitled to fee awards, while prevailing defendants are entitled to fees only if they can demonstrate that the plaintiff's suit was "frivolous, unreasonable, or without foundation." *Christiansburg,* 434 U.S. at 421. But CBE errs in asserting that *Christiansburg* established a general approach for determining fee awards under all federal fee-shifting statutes; the Court's decision in *Fogerty* makes clear that the *Christiansburg* approach is not necessarily applicable outside the context of civil rights cases.

CBE also relies on the absence of any direct conflict among the federal appeals courts regarding the Question Presented. CBE is correct, as we recognized in the Petition, that the Seventh Circuit's approach is consistent with that of the only other circuit to have addressed that question directly -- the Ninth Circuit. But as we explained in the Petition, the Seventh and Ninth Circuits reached their conclusions not on the basis of any legal analysis, but because they have been confused by the Court's decision in *Delaware Valley*. Both appeals courts have erroneously interpreted *Delaware Valley* as precluding them from considering any arguments against application of the *Christiansburg* dual standard in environmental citizen suits. Because, for whatever reason, the appeals courts do not feel at liberty to address the issue themselves, this Court is the only possible source of guidance on the issue.

The exceptional importance of the Question Presented is demonstrated by the filing of *amicus curiae* briefs in

support of the Petition by the State of California Auto Dismantlers Association, the Pacific Legal Foundation, the Chemical Industries Council of Illinois, the Mid-America Legal Foundation, and the Illinois Manufacturers Association. Thousands of businesses each year find themselves the target of citizen suits filed under the federal environmental laws; whether fees are to be awarded in such cases on an even-handed basis to prevailing plaintiffs and prevailing defendants plays a substantial role in the disposition of such suits. This Court has not previously supplied an answer; review is warranted to provide the business and environmental communities with the answer they so desperately need.

I. CBE'S EFFORTS TO DISTINGUISH *FOGERTY* ARE UNAVAILING

The decision below directly conflicts with this Court's decision in *Fogerty*. In construing fee-shifting language in the Copyright Act that is virtually identical to the fee-shifting language at issue here, the Court held that the Copyright Act's fee-shifting language "gives no hint that successful plaintiffs are to be treated differently from successful defendants." *Fogerty*, 510 U.S. at 522. Based on that language, the Court held that the Copyright Act required fee petitions from prevailing defendants and fee petitions from prevailing plaintiffs to be placed on an equal footing. *Id.* at 534.

CBE's efforts to distinguish *Fogerty* are unavailing. CBE disputes our assertion that the relative wealth of Copyright Act plaintiffs (in relation to civil rights plaintiffs) played a significant role in *Fogerty*'s decision not to extend the *Christiansburg* dual fee-award standard outside the context of civil rights cases. Opp. Br. 17-18. But CBE fails to address the relevant language from *Fogerty* that we cited

in the Petition. For example, *Fogerty* explained that *Christiansburg* adopted a dual standard in civil rights fee-shifting cases in substantial part because many civil rights plaintiffs are "impecunious" and because Congress intended to "redress the balance in part" between poor plaintiffs and "defendants with more resources" "by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney fees" -- and thereby encourage the filing of more civil rights suits. *Fogerty*, 510 U.S. at 524. In contrast, the Court noted, Copyright Act plaintiffs are far less likely than civil rights plaintiffs to be poor; "[e]ntities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists." *Id.*

CBE does not seriously challenge our assertion that the financial profile of the typical plaintiff in environmental citizen-suit litigation has far more in common with the typical Copyright Act plaintiff than the typical civil rights plaintiff. As we demonstrated in the Petition, virtually all environmental citizen-suit litigation is initiated by relatively large environmental organizations. Indeed, CBE -- one of the smaller organizations that regularly engages in such litigation -- admits to annual revenues in the $2 million range. Opp. Br. 18.[1]

CBE's only response is to note that its annual revenues are less than those of The Steel Company. Opp. Br. 17-18.

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[1] According to its IRS (Form 990) filing for fiscal year 1999, CBE had revenues in excess of $2 million. *See* Brief of *amici curiae* Pacific Legal Foundation ("PLF"), *et al.*, at 18. PLF also inspected the Form 990s of four other environmental groups that play a prominent role in environmental citizen-suit litigation; their annual revenues ranged from $18 million to $111 million, and their net assets ranged from $14 million to $133 million. *Id.* at 18-19.

But that response does not address *Fogerty*'s rationale, which is that there is no reason to presume that Congress intended to create a dual fee-award standard in favor of prevailing plaintiffs if the financial resources of the typical plaintiff bringing suit under the statute at issue are such that an even-handed fee-award standard would not unduly discourage that plaintiff from filing suit.

CBE also attempts to distinguish *Fogerty* on the ground that, in terms of goals and objectives being served, environmental citizen suits have far more in common with the civil rights suits at issue in *Christiansburg* than the Copyright Act suits at issue in *Fogerty*. Opp. Br. 12-14. But CBE fails to address the decisions of this Court, cited in the Petition, that indicate that the role of the plaintiff in an environmental citizen suit is far different from the role of the plaintiff in a civil rights suit. *See* Pet. 22-24 (discussing *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989)).

The decision below cannot be squared with this Court's decision in *Fogerty*. Review is warranted to resolve that conflict.

II. BOTH THE STATUTORY LANGUAGE AND THE LEGISLATIVE HISTORY OF ENVIRONMENTAL FEE-SHIFTING PROVISIONS SUPPORT THE STEEL COMPANY'S CONTENTION THAT PREVAILING DEFENDANTS ARE TO BE PLACED ON AN EQUAL FOOTING WITH PREVAILING PLAINTIFFS

Perhaps the most striking feature of CBE's opposition brief is that it contains absolutely no discussion of the statutory language at issue. Section 11046(f) provides that in

an EPCRA case, a district court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate." Review is warranted in order to resolve whether the Seventh Circuit was justified in reading a dual fee-award standard into the party-neutral language of § 11046(f).

CBE makes no attempt to explain the Seventh Circuit's decision in terms of the language of § 11046(f). Rather, CBE presents a selective reading of the legislative history of other environmental statutes in support of its counter-textual assertion that Congress intended to create a dual fee-award standard under EPCRA. Opp. Br. 16. For example, CBE relies on a snippet from the legislative history of the Clean Air Act in support of its position:

> [T]he Senate Report on the Clean Air Act, which provides for fee awards to "any party, whenever the court determines such award is appropriate" (Section 304(d); 42 U.S.C. § 7604(d)), explains that this section allows courts to award fees "to defendants where the litigation was obviously frivolous and harassing. This should . . . discourag[e] abuse of this provision, while at the same time encouraging the quality of the actions that will be brought." S. Rep. No. 1196, 91st Cong., 2d Sess. 38-39 (1970).

Id. CBE has distorted the meaning of the passage in the Senate Report by providing only a partial quotation. When read in its entirety, the passage makes clear that a lawsuit that was "frivolous and harassing" was one instance in which a court "could" award fees to a prevailing defendant, not (as CBE suggests) that such suits were the *only* instance in which such a fee award would be appropriate:

> The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing.

S. Rep. No. 1196, 91st Cong. 2d Sess. 36-39 (1970) (quoted in *Natural Resources Defense Council, Inc. v. Train,* 510 F.2d 692, 725 (D.C. Cir. 1975)).

Indeed, as we pointed out in the Petition (at 20-21) and as the Court has found (in *Ruckelshaus v. Sierra Club,* 463 U.S. 680, 692-93 (1983)), the legislative history of the Clean Air Act indicates that the Act's fee-shifting provision was added as a means of assisting prospective *defendants,* not prospective plaintiffs. Because the "central purpose" (*id.*) of fee-shifting provisions in environmental statutes is to cut down on the number of meritless citizen suits being filed, such provisions cannot fairly be interpreted as favoring plaintiffs over defendants. CBE's efforts to distinguish *Ruckelshaus* (Opp. Br. 14-15) are unavailing. *Ruckelshaus* was unequivocal in finding that the primary reason for adding a fee-shifting provision to the Clean Air Act was to protect defendants from meritless suits. *Id.* at 692-93. CBE is correct, of course, that the provision had the additional purpose of encouraging the filing of meritorious citizen suits (Opp. Br. 20); otherwise, there would have been no reason to permit the award of fees to prevailing environmental plaintiffs. But there can be no justification for interpreting a fee-shifting statute as favoring plaintiffs over defendants when it was adopted at the insistence of those who sought to provide a benefit to defendants.

III. UNDER THE DUAL FEE-AWARD STANDARD, THE BUSINESS COMMUNITY FACES ENORMOUS FINANCIAL PRESSURE TO SETTLE ENVIRONMENTAL CITIZEN SUITS WITHOUT REGARD TO THE MERITS OF SUCH SUITS

The Petition explains at length how lower courts' adoption of a dual fee-award standard in environmental citizen suits has transformed such suits from the supplemental enforcement mechanism envisioned by Congress into a shakedown system under which companies must pay tribute to environmental groups as a cost of doing business. Pet. 28-30.

In response, CBE suggests that The Steel Company has exaggerated the burden imposed on the business community by environmental citizen suits. Opp. Br. 18-20. CBE notes, for example, that the number of environmental citizen suits filed against private entities has actually declined somewhat over the past six years. *Id.* at 18-19 n.4. But that trend is of little consolation to the business community if, as The Steel Company asserts, the level of environmental litigation against private companies has been at a very high level throughout the past decade. CBE does not challenge The Steel Company's assertions that environmental citizen suits did not exist at all prior to 1970, and that there has been an "explosion" in the number of such suits as compared to litigation levels in the early 1980s.

Moreover, the number of suits actually filed does not begin to tell the whole story. Many companies pay substantial settlements to environmental groups that send them the required 60-day advance notice of intent to sue, even without any lawsuit being filed. Such settlements, which are not reflected in the litigation figures cited by CBE,

impose a significant burden on the business community. *See* Michael S. Greve, *The Private Enforcement of Environmental Law,* 65 TUL. L. REV. 339 (1990).

CBE does not contest The Steel Company's assertion that in all but one of the reported decisions involving citizen suits brought under EPCRA against non-governmental defendants, the plaintiff was an environmental group, not an individual. Pet. 25. CBE responds by pointing to the number of reported decisions identified by The Steel Company (nine) as evidence that we have exaggerated the burden imposed on the business community by environmental citizen suits. But the number of reported decisions obviously bears little relation to the total number of EPCRA cases that have been filed. Many lawsuits do not result in any written decision; and even when the presiding judge writes a decision (s)he more often than not will decide not to publish the decision in an official reporter. As noted in the Petition, one environmental group, the Atlantic States Legal Foundation, claims to have litigated "hundreds of successful EPCRA and Clean Water Act cases." Pet. 25 n.10. Moreover, as noted above, as is true of other environmental statutes, the number of lawsuits filed under EPCRA does not reflect the burdens imposed on companies forced to enter into settlements with environmental groups after receiving a 60-day notice-of-intent-to-sue letter but before suit is actually filed.

CBE also contends that the situation faced by environmental citizen suit defendants is no different from the situation faced by all other civil defendants: "[A]ll civil defendants can claim that their inability to recover attorney's fees under the ordinary "American Rule" creates settlement pressure, even in cases they might consider to be winnable." Opp. Br. 20. But as we explain in the Petition, it is not merely the inability to recover fees that creates the pressure

for defendants to settle. Under the dual fee-award standard endorsed by the Seventh Circuit, environmental defendants must also factor in the possibility (no matter how slight) that the plaintiff will prevail -- thereby exposing the defendant to substantial fines *and* the prospect of paying the plaintiff's attorney fees as well as his own.[2]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Sanford M. Stein
Leo P. Dombrowski
WILDMAN, HARROLD,
ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Dated: April 4, 2001

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[2] CBE also argues that review should be denied because there is no subject matter jurisdiction in the federal courts to hear The Steel Company's fee petition. Opp. Br. 20-22. The Seventh Circuit quite rightly rejected that contention, basing its decision on this Court's decision in *Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992). CBE is quite correct that there is a circuit split on this jurisdictional issue and that the Seventh Circuit arrived at its decision after explicitly rejecting the holdings of three other circuits. Pet. App. 8a-9a. But that split in authority does not render this case any less worthy of review; to the contrary, it provides an additional reason for review if the Court is inclined to resolve the conflict over the jurisdictional issue.